

**International Longshoremen's Association, Local 1426 (Carolina Atlantic Transportation) and Eula Benjamin Jones, Jr. Case 11-CB-1789**

June 24, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On September 30, 1991, Administrative Law Judge Robert G. Romano issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the General Counsel did not prove the complaint allegation that the Respondent, International Longshoremen's Association, Local 1426 (Local 1426), unlawfully caused the Employer, Carolina Atlantic Transportation (CATS), to discharge employee Eula Benjamin Jones Jr. on May 16, 1989,<sup>1</sup> and he accordingly dismissed the complaint. We find merit in the General Counsel's contention that under *Austin & Wolfe Refrigeration*, 202 NLRB 135 (1973), Local 1426's insistence on retroactive application of its hiring hall clause caused the Company to discharge Jones in violation of Section 8(b)(2) and that this conduct also restrained and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A).

The record, in brief, shows that in the spring of 1988 CATS commenced port operations at several locations, including Wilmington, North Carolina, and discussed using longshore labor with 1426 President Willie Sloan. Sloan offered copies of separate contracts for longshore labor and for container maintenance repair, but CATS replied that it employed only one container repair mechanic<sup>2</sup> and so was interested in contracting solely for longshore labor.

Local 1426 supplied CATS with longshoremen through its hiring hall in 1988 and early 1989 while the parties were engaged in negotiations for a longshore collective-bargaining agreement. However, when in mid-March the parties broke off negotiations

and Local 1426 engaged in 4 to 6 weeks of picketing, the source of CATS' longshoremen was changed from Local 1426's hiring hall to temporary employment agencies, such as the Olsten agency.

Contract negotiations between CATS and Local 1426 resumed in late April or early May, with President Shinn and Vice President Gautier representing CATS, and President Sloan and Vice President Vaught representing 1426. These negotiations led to the execution of a nonretroactive contract on May 12 providing, inter alia, for exclusive referrals of longshoremen and container maintenance and repair mechanics.<sup>3</sup>

On May 15, the parties met to discuss application of the May 12 contract to CATS' stipulated unit of longshoremen and container maintenance and repair mechanics. The discussion focused on the container maintenance work, with Gautier indicating that CATS had three full-time and two part-time employees,<sup>4</sup> and asking if Local 1426 would agree to allow them all to remain on the job. Sloan's response is set forth in the following affidavit in evidence:

Shinn and Gautier told me . . . they had three full time and two part time mechanics. And as I recall Ben Jones was one of those people. . . . Shinn and Gautier asked me if I would agree to allow those men to stay on the job. I said no, that I would not agree to it because we had a hiring hall agreement and that I had qualified men to fill the jobs who were not working. I did not say that I would not accept the men in the Union. I said I would not allow the Company to keep those men on the jobs.

Sloan thereafter moderated his position and agreed with CATS' request to continue to employ its full-time employees, who were identified to him as Dobson, Whitman, and Smith. At no time, however, did Sloan retract his opposition to CATS' continued employment of part-time mechanics.<sup>5</sup> Jones was informed of his

<sup>3</sup> It is undisputed that the hiring hall operated on a nondiscriminatory basis, that longshore laborers were referred on a daily basis whenever there was a barge to be on- or off-loaded, and that container mechanics who were referred and found acceptable were put on the requesting employer's own payroll.

<sup>4</sup> The judge noted that both parties during the hearing interchangeably referred to "permanent" employees as "full time" employees, and to "temporary" employees as "part time" employees. The record does not show that the exact nature of the part-time employees' employment was clarified at the May 15 meeting, although the judge credited testimony that the Olsten Temporary Employment Agency was referred to in that meeting.

<sup>5</sup> The testimony does not indicate that the part-time employees were specifically identified at the meeting. CATS subsequently apprised Local 1426 that it had mistakenly identified Dennis Smith as a full-time employee instead of Roy Schutz, and secured Local 1426's agreement for it to retain Schutz on the condition that no employee already referred from the hiring hall be let go. It appears that Smith, who in fact was an Olsten employee, also continued employment after being identified as part time.

<sup>1</sup> All dates are in 1989 unless otherwise indicated.

<sup>2</sup> Shortly thereafter, CATS obtained Jones through Olsten Temporary Employment Agency to perform container maintenance and repair work. The record shows that Jones went on CATS' payroll in January 1989, although Jones' status was apparently never communicated to the Respondent.

termination that same night in a telephone call from Supervisor Westbury.<sup>6</sup>

The judge found that Sloan's admission in his affidavit that he would not allow CATS to keep all of its mechanics related to the Union's position, subsequently moderated, on how its hiring hall applied to mechanics generally. Thus, the judge found that Local 1426's ultimate position was that only full-timers be retained. He further found no convincing evidence that Sloan was told that Jones was a full-time employee; consequently, he concluded that Jones could be reasonably viewed by the Union as part time (or still temporary). The judge rejected the General Counsel's claim that *Austin & Wolfe*, above, prohibits the application of a new contractual hiring hall arrangement in a manner which adversely affects the job status of part-time or temporary employees who were then in CATS' employ. The judge, relying on *Seatrain Terminals*, 205 NLRB 814 (1973) (which allowed an employer to change a steady employee to a casual, effectively returning that employee to a hiring hall for non-discriminatory referral), ruled that it is permissible for a union to negotiate for recurrent referrals to meet ongoing part-time or temporary employment needs.<sup>7</sup> The judge concluded that although there is evidence that the Union was seeking to have part-time and temporary jobs filled by referrals, the General Counsel had failed to show that this objective was unlawful or that it caused or attempted to cause CATS to take the job action against Jones because he was not a union member, as alleged in the complaint.

We find, in agreement with the General Counsel, that the judge erred in finding that *Austin & Wolfe* did not apply to the facts in this case. *Austin & Wolfe* did not differentiate between full-time and part-time employees in condemning the retroactive application of the hiring hall, but focused solely on the fact that the union had requested that the employees in question be discharged. The Board in that case set out its holding in a clear, unconditional statement: "[T]he discharge of an employee at the insistence of a union because he had not been referred by the union's hiring hall . . . is the plainest kind of discrimination." *Id.* at 135. It is beyond doubt that Local 1426's initial resistance to CATS' retention of any maintenance mechanics was

inconsistent with its obligations under *Austin & Wolfe*. We see no basis for finding that Local 1426's efforts were other than discriminatory when they were applied to part-time employees, especially as the record shows that the exact nature of these employees' job tenure was neither clarified nor discussed. In particular, we find that *Seatrain Terminals*, relied on by the judge, is not relevant to the facts of this case. In *Seatrain*, the employee was hired after the effective date of the hiring hall agreement. After hire, the status of an employee was changed so as to require his return to the hiring hall. In the present case, the employee was hired prior to the effective date of the agreement, and no effort was made to modify the status of part-time maintenance mechanics. Under the hiring hall procedure, maintenance mechanics were referred out and retained by the employers, and there was no requirement that these mechanics return to the hiring hall for daily or recurrent referral. Further, it is beyond dispute that Local 1426 did not attempt to change the status of CATS' part-time mechanics in any way other than to seek their discharge because they had not been referred out of the hiring hall. As in *Austin & Wolfe*, this "is the plainest kind of discrimination," and there is no need for the General Counsel to establish additional proof of unlawful motivation.

We find, therefore, that Local 1426's demand that its hiring hall agreement be applied retroactively to all but full-time container maintenance and repair mechanics unlawfully caused CATS to discharge Eula Benjamin Jones, in violation of Section 8(b)(2) of the Act and that this conduct also restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act.

#### CONCLUSION OF LAW

By causing the Company to discriminate against Eula Benjamin Jones by discharging him on May 16, 1989, and by restraining and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, the Respondent Union has engaged in unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) of the Act, respectively.

#### THE REMEDY

Having found that the Respondent has caused the discriminatory discharge of Eula Benjamin Jones on May 16, 1989, we shall order the Respondent to notify Carolina Atlantic Transportation in writing, with a copy to Jones, that it has no objection to his hire and that it requests Jones be hired.<sup>8</sup> We shall further order

<sup>6</sup>The judge also recited testimony by Gautier regarding his expression of CATS' interest at this meeting in a discussion of union membership or "membership protection" for its five mechanics, and Sloan's refusal to grant union membership to Jones. In light of our findings below, we find it unnecessary to pass on whether Local 1426's denial of membership for Jones played any role in CATS' discharge of him.

<sup>7</sup>The judge also opined that the hiring hall here encompassed filling CATS' future part-time or temporary employee needs for unit work previously performed by part-time or Olsten temporary employees, and accordingly, it makes a difference whether Jones was a full-time or temporary employee and whether the Union had, or should have had, knowledge of his permanent status.

<sup>8</sup>Because it is unclear on the record whether Carolina Atlantic Transportation is still in business, we shall defer to the compliance stage of this proceeding the determination whether there is an entity to whom Respondent can direct this traditional request for reinstatement remedy. See *Carpenters Local 2396 (Tri-State Ohbayashi)*, 287 NLRB 760, 767 (1987).

the Respondent to make Jones whole for any loss of pay and other benefits he has suffered by reason of the discrimination, by payment to him of a sum of money equal to the amount of wages he would have earned but for the discrimination, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

### ORDER

The National Labor Relations Board orders that the Respondent, International Longshoremen's Association, Local 1426, Wilmington, North Carolina, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing, or attempting to cause Carolina Atlantic Transportation to discharge, or otherwise deny employment to, any employee, or in any other manner discriminate against any employee in regard to his hire, tenure of employment, or any term or condition of employment.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Eula Benjamin Jones whole as provided in the remedy section of this decision.

(b) Notify Carolina Atlantic Transportation that it has no objection to its hiring Eula Benjamin Jones and request that it do so.

(c) Post at its usual membership meeting place copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by CATS, if willing, at all places where notices to employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>9</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Carolina Atlantic Transportation or any other employer to discriminate against any employee by discharge or otherwise.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse Eula Benjamin Jones for any loss of pay he suffered by reason of the discrimination, with interest.

WE WILL notify Carolina Atlantic Transportation that we have no objection to its hiring Eula Benjamin Jones and WE WILL request that it do so.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1426

Donald R. Gattalaro, Esq., for the General Counsel.

A. A. Canoutas, Esq., of Wilmington, North Carolina, for the Respondent.

### DECISION

#### STATEMENT OF THE CASE

ROBERT G. ROMANO, Administrative Law Judge. This case was tried in Wilmington, North Carolina, on April 16 and June 14, 1990. The charge was filed by Eula Benjamin Jones, an individual Charging Party (Jones), against International Longshoremen's Association, Local 1426 (Local 1426 or Respondent Union) on July 19, 1989.<sup>1</sup> The complaint issued on October 31.

The complaint alleges that on or about May 15, Respondent Union attempted to cause, and caused, Carolina Atlantic Transportation (the Employer or CATS) to discharge its employee Jones in violation of Section 8(a)(3) of the Act, because Jones was not a member of ILA Local 1426 and that, thereby, Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act.

The issues arise in context of numerous factual disputes regarding Union's transition in providing an exclusive hiring hall referral service in May for the Employer's longshore and maintenance operations at Wilmington, North Carolina. In recently negotiated contract(s), the parties agreed that the Union would provide an exclusive hiring hall referral service to CATS' maintenance shop and longshore operation. Under an earlier agreed, but interrupted contract (subscription agreement), the Union had exclusively referred temporary or cas-

<sup>1</sup> All dates are in 1989 unless otherwise indicated.

ual help to the Employer's longshore operation of loading and unloading containers on barges (only), while the parties negotiated a full agreement. Other factual and legal issues arise on further union claims made with regard to the Employer's maintenance employees (and contrary to the claim of the counsel for the General Counsel that the Union said it would not allow CATS to continue to employ its maintenance employees), that the Union agreed to CATS' continued employment of all named full-time employees in maintenance, but the Union defends in light of its negotiated contract to provide casual or temporary employees for the Employer's maintenance operation. The Union need not agree that the Employer continue part-time employees in employment.

Numerous credibility questions arise because of conflicts, inconsistencies, and confusion in evidence presented by both parties, e.g., on full-time versus part-time, and/or on permanent versus temporary status of container mechanics employed by CATS, or as may be shown employed by other employer(s) but working for and at CATS' maintenance facilities. The Union has not only questioned Brown's full-time employment status with CATS in material times, but also the Union claims that if Brown was then actually a full-time CATS' employee, Brown was not mentioned by the Employer as a full-time employee in the crucial all-party meeting (disputedly) held on May 15 when local issues were first discussed and, if it be determined it was some time later mentioned to the Union, it was then said at a time when the Employer had already assigned Brown to a nonunit job. Record conflict also arises on contended but disputed union membership solicitation, and union acceptance of certain mechanics into membership, but not others, e.g., Brown.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent Union on or about August 2, 1990, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

CATS is a North Carolina corporation with a facility in Wilmington, North Carolina, where it is engaged in arranging for transportation of containerized freight in interstate commerce pursuant to arrangements with common carriers, each of which operates directly between and among various States of the United States. In the material period, CATS annually derived gross revenues in excess of \$50,000 from its above operations. The complaint alleges, and Respondent Union in answer and/or at hearing admits, and I find that CATS is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

#### 1. The principals

##### a. The Employer

CATS operated port facilities at San Juan, Puerto Rico, Wilmington, North Carolina, and Savannah, Georgia. CATS maintained headquarters at Wilmington, and it had significant, if not main, customers in Puerto Rico. Though CATS was initially promoted by Clint Abernathy, William Edwards was president during material operations in 1988. Edwards occupied that position until January when Tom Shinn became CATS' president. CATS hired Ed Gautier as a labor consultant on April 3, on a 90-day contract. Within that term, CATS hired Gautier as its vice president in charge of all port operations and administration. CATS has regularly employed a work force of between 30-33 employees.

##### b. The Unions

#### (1) Respondent

Respondent Local 1426 is a longshoremen's local servicing Port Wilmington. Willie Ervin Sloan is, and has been, president of Local 1426 for 10-1/2 years. Clayton Alfred Vaught Sr. has been a longshoreman for about 22 years. Vaught is currently vice president and business agent of Local 1426. As the business agent, Vaught oversaw the hiring (hall) for Local 1426. Thus, Vaught regularly worked with (various) management on orders for, and in dispatch of, labor from Local 1426. In material times, Local 1426 normally ran an 11-man gang on management's order for longshoremen.

#### (2) The other involved Unions

ILA Local 1338 is also a longshoremen's local, and it services nearby Southport. However, Local 1338 has a labor share agreement with Local 1426, by virtue of which, essentially, Local 1338 fills every fourth gang on management order. Local 1426 and Local 1338 are otherwise separate locals. Local 1338 does not rely on Local 1426 for men. Henry Rose is president of Local 1338. ILA Local 1776 is a clerks' and checkers' union servicing (apparently) both Port Wilmington and Southport. Jerry Hammonds is president of Local 1776.

Sloan in no capacity speaks for Clerks and Checkers Local 1766, nor does its president Hammonds speak for Sloan or Local 1426. They each have their own contract. Though the two Unions negotiate jointly, in the sense they sit in on each others' meetings, they don't comment on each others' contracts.

There were three other (comparable) ILA local unions that serviced Savannah, and on that account, participated in the certain negotiations at Savannah described below. The Savannah ILA Locals appear otherwise as essentially not material to the matters raised in the instant proceeding.

*c. The 1988 start of negotiations*

Sloan and CATS first entered into discussion concerning the employment of ILA-referred employees at CATS facilities around April 1988. At that time, Abernathy of Raleigh, North Carolina, came to Sloan's office and told Sloan that he had put CATS together, and he wanted to consider using ILA labor. A lengthy discussion followed, during which Sloan gave Abernathy a copy of the applicable contracts.

Sloan told Abernathy initially that the Union would negotiate with him not only for the employees necessary to perform (longshore) loading and discharging of the vessels (barges transporting containerized freight for CATS), but also to perform all labor required for container maintenance and repair. To that end, Sloan gave Abernathy a copy of the applicable ILA deep sea (longshoremen) contract, and the applicable (container) maintenance contract. The contract covering clerks and checkers was to be separately negotiated by the involved ILA clerks and checkers union(s). Several meetings and discussions followed.

Approximately 1-2 months later, William Edwards, who was (then) president of CATS, got directly involved in negotiations. At first, Sloan met with both Edwards and Abernathy in negotiations a couple of times, without the parties coming to an agreement.

At some, probably early point in such negotiations, Edwards told Sloan that Edwards didn't know anything about maintenance container repair. Edwards then informed Sloan that Edwards was negotiating with some companies that were involved in maintenance container repair. Edwards told Sloan that Edwards was going to sign a contract either with the Union for the maintenance repair, or he was going to sign a contract with one of the local maintenance container repair companies already established in Wilmington.

At some equally early point in the negotiations Edwards informed the Union that CATS (at that time) employed only one container repair mechanic. Local 1426 Vice President Vaught has testified without contradiction that when CATS started operations, he (presumably Edwards) had told the Union that (Charles) Dobson was the only mechanic they employed.

In August 1988, the Union agreed to start (supplying longshoremen for) the loading and discharging of CATS' vessels under the following circumstances. Edwards called Sloan and told Sloan that Edwards had a barge coming in. Sloan was in Washington, D.C., at the time. Sloan told Vaught to provide the labor, and when Sloan got back to Wilmington, they would continue the negotiations.

Although the parties hadn't completed contract negotiations, Respondent Local 1426 (and apparently Local 1338) agreed to work or supply longshoremen (but notably not any maintenance container repair mechanics), under terms of an agreed-on ILA subscription agreement which was signed by CATS, and which was to remain in effect while the parties continued to try to complete negotiation of their first regular contract. Vaught confirmed that Respondent had not initially supplied any mechanics to CATS and that the parties' original agreement didn't cover them. (To extent certain of Gautier's initial testimony may indicate that the Union supplied longshoremen without a contract, it vacillated, was later effectively retracted, and is not credited.) When Local 1426 started supplying longshoremen to work the barges about August 1988 under the above subscription agreement ar-

rangement, Abernathy left the scene. Negotiations were thereafter conducted directly with Edwards, and continued until early 1989, but still without the parties' reaching agreement.

In October 1988, CATS had work for another container mechanic. Charging Party Jones performed this work at CATS, but as a temporary employee, employed by another company, below. Presently I find that in the interim, starting in August 1988, in return for ILA supply of longshoremen labor to CATS on call, CATS had agreed to pay all current contract wages *and* fringe benefits for longshoremen, until the parties could negotiate a regular complete contract.

*d. The hiring hall operations*

In general, once management and the Union reach an agreement, management begins calling the union hall for all of its required labor and the Union will dispatch men from the union hall to a company jobsite to meet stated manpower requirements.

Under the parties' interim subscription agreement, the longshoremen were picked and referred to CATS to perform the work of loading and unloading barges under the following (regular) hiring hall system. On a daily basis (when labor was needed), CATS' management called the union hall and told the Union how many men they would need. The Union posted the available jobs on the board. On the next morning, through an operative gang system, the necessary men were picked by a foreman, who rotated.

The men in all currently established gangs are all union members, though vacancies in gangs are filled by seniority, be the individual Union or nonunion. Acknowledging North Carolina is a right-to-work State, Sloan confirmed you don't have to be a unionman to work, and Sloan testified relatedly, and without apparent contradiction, that Local 1426 works plenty of nonunionmen.

With regard to employment of container repair mechanics, according to Sloan, a company basically decides who they want. If the company asks the Union to refer such men, the Union does. If the container repairmen that the Union refers are acceptable, they are put on the company's payroll and, if not acceptable, the company sends them back to the hall. If the men referred are qualified, a company usually keeps them.

In January (1989) Shinn joined the Company as president. In January, CATS apparently put temporary mechanic Jones directly on CATS' payroll as a full-time employee. The Union continued negotiations with Shinn in March. On March 16 or 17, contract negotiations broke off; and Local 1426 put up picket lines. There is conflict between CATS' vice president Gautier and Local 1426's vice president Vaught over the reasons for the March breakdown in negotiations.

Gautier initially stated in resumed hearing, CATS' dispute in early April with the ILA was over employment opportunities at CATS' Wilmington, North Carolina, and Savannah, Georgia facilities. (Gautier did not initially timely respond to the General Counsel's subpoena.) Gautier claims the ILA basically wanted both the stevedore and terminal work there; they wanted jurisdiction over the jobs CATS had there, to put ILA people to work, and they wanted a contract. On cross-examination, Gautier clarified it was in March 1989, shortly before his arrival, that the ILA had informed CATS

of certain terms and conditions that CATS would have to meet in order for ILA to continue to work the vessels, and it was about the time he showed up (as consultant) that management determined that the Company could not afford to meet those demands at the risk of going out of business.

Gautier relates that to try to achieve its goals, the ILA then picketed for a period of at least 4 to 6 weeks. In describing the picketing during that time, Gautier summarizes that after a time, things got pretty hectic here (in Wilmington) and more so in Savannah.

Vaught saw and described the reason for the parties' labor dispute that arose in March quite differently. Vaught relates that their (subscription) agreement stopped because CATS had a problem with the ILA on paying the agreed royalty (fringe benefits), and Vaught asserts that at that time, CATS had also decided that they would go another way in off-loading the barges. One morning, CATS just didn't order any more labor from Local 1426, and they just started to move men down to work on the barges. It was then that the ILA put up an informational picket line.

After a 4-6 week period of time, the parties again met, and resumed their negotiations. The first time Sloan saw Gautier was in the (resumed) contract negotiation meeting they held in Savannah, which Sloan has recalled as around the last of April, or first of May, and which I find was more likely early May. Present at resumed negotiating meetings held in Savannah were union officials from all six of the involved ILA Locals, namely, the three ILA Locals from Wilmington and three ILA Locals located in Savannah.

The parties stipulated that a unit that would include the longshoremen and container maintenance repairmen employed at Wilmington, excluding supervisors as defined in the Act, is an appropriate unit for the purposes of collective bargaining. (Clerks and checkers are in a separate appropriate unit, and they are covered by separate agreement as negotiated by separate checker union(s).)

Sloan and representatives of other longshoremen unions entered into nonretroactive contract(s) with CATS on May 12, which if not effective that day, was (were) pragmatically effective on May 13 (Saturday). Shinn and Gautier signed for CATS. By contract terms, the union(s) were to provide all labor for the loading and/or discharging of barges and mechanics for container maintenance and repair. Any checker required would be provided under Checkers' contract.

#### *e. Interim change in Jones' employment*

Charging Party Jones started working for (at) CATS in October 1988 as a container repair mechanic. Jones did so initially as a temporary employee, i.e., an employee who though working at CATS' facility was actually employed by another company. Olsten Temporary Employment Agency (Olsten) directly employed and paid Jones at this time. CATS did not employ Jones as a full-time CATS' employee until the next year, apparently first, sometime in January.

The parties relatedly early stipulated that Jones' W-2 wage and tax statement for 1989 shows the Employer as CATS, though not without some confusion subsequently appearing of record, discussed further below. In any event Jones worked as a container repair mechanic during the entire time he worked at CATS, both first as employed by Olsten, and then directly by CATS, and Jones did so (at least) *through May 16 when initially notified he was terminated.*

Under what circumstances Jones may have later worked for CATS as an Olsten temporary and in what manner Jones later was again employed by CATS and has again been terminated, are more conveniently discussed further below.

Jones' first supervisor was Donnie King, previously an operations manager of the Employer's predecessor and (apparently) also of CATS. CATS employed Wesley Westbury as operations manager in 1989, who then supervised Jones.

#### *f. The first termination of Jones*

On May 15, Jones worked at CATS the entire day, leaving work about 5 p.m. CATS' operations manager Westbury called Jones on the phone about 1 a.m. on May 16. Westbury told Jones that Jones no longer had a job at CATS. Westbury did not testify in this proceeding. Related ruling sustaining the Union's timely hearsay objection to Jones' relation of a Westbury statement made to Jones that Westbury (purportedly) attributed to Sloan in a May 15 Wilmington meeting (below) is reaffirmed, especially with it established that Westbury had not attended that meeting.

#### *g. The parties' basic contentions*

The General Counsel sees the central issue as revolving about the above Wilmington meeting, characterized by the General Counsel as a meeting to discuss how a hiring hall agreement would be put in place. Relying on the holding of *Austin & Wolfe Refrigeration*, 202 NLRB 135 (1973), that a lawfully contracted hiring hall may not be applied *retroactively*, the General Counsel contends that at this meeting Sloan had unlawfully advised Shinn and Gautier that the Union would not allow the Company to continue employing Jones who had been a permanent employee there for the last 6 months.

Counsel for the General Counsel also contends that Jones cannot be faulted for not subsequently applying for membership in Local 1426 (where the record reveals that certain other full-time mechanics, who did, were accepted into membership in Local 1426) for the reason that under all the attendant circumstances it would have been futile for Jones to have attempted to do so. The General Counsel has further argued that because North Carolina is a right-to-work State, Respondent Union could not legally require CATS to discharge its employee Jones because of his (nonmembership) status within the ILA. The General Counsel's argument is one advanced on claimed guarantees of Section 14(b) of the Act that no other sections of the Act can extinguish state power over certain union-security arrangements, with stated reliance for the unfair labor practice urged to be found on the basis of the 14(b) provision and related Supreme Court observation, see *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 751 (1963):

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

As is immediately apparent from its language, § 14 (b) was designed to prevent other sections of the Act from

completely extinguishing state power over certain union-security arrangements.

The General Counsel has relatedly requested administrative notice be taken of N.C. Gen. Statute Section 95-78, et seq. Pertinently, *id.*, 95-80 provides:

No person shall be required by an employer to become or remain a member of any labor organization as a condition of employment or continuation of employment by such employer.

Respondent Union centrally disputes any such statement was made as is above claimed to be attributed to Sloan, i.e., of Respondent Union's opposition to CATS' continued employ of Jones as a permanent, full-time employee because of Jones' lack of union membership. The Union rather contends that at the time of the parties' first transition meeting in Wilmington after the signing of the contract on May 12, the Union did not then know whom Employer employed full time and whom part time (sic), except as it was told by the Employer in the meeting of May 15.

Indeed, the Union contends that in fact the Company supplied erroneous information at that time to Sloan and the Union, on which Sloan and the Union had proceeded in good faith; that Sloan and the Union were not at that time told that Ben Jones was a full-time employee; that only later were they told the Company had erred in informing Sloan and the Union who were the Company's full-time employees; and, even if it is to be determined that in some manner, the Company had subsequently informed Sloan and the Union that Jones was a full-time employee, by that time, the Company had also already informed the Union that Jones was to be employed in a nonunit position.

Respondent Union also generally defends that Sloan had no motivation to discriminate against Jones, whom Sloan didn't even know at the time, and the facts simply do not support a finding that the Union violated the Act as has been alleged.

#### Some Preliminary Observations on the General Credibility and Ruling Declining Certain Requested Adverse Inferences

The Union does not appear to contest the General Counsel's above-observed precedent, including the hiring hall precedent (at least) in brief beyond assertion (notably, without cited authority) that the law does not require continuation of part-time (sic) employees. (There is, however, indication in Respondent's brief that Respondent has continued hearing reference to a temporary employee as a part-time employee.)

In regard to the Union's contention that part-time employees need not be continued, it would appear in general that an employer may agree with a union supplying casual or temporary employees to perform longshore work, to also supply container repair mechanics on a steady or casual basis and, consonant therewith, that an employer may effect adverse employment action (e.g., change a steady employee to a casual employee), so long as not changing status of the employee for discriminatory or other unlawful (e.g., anticoncerted activity) purpose. Cf. *Seatrains Terminals of California*, 205 NLRB 814 (1973). However, the Board has held that discharge of a casual, or even an admittedly defi-

cient, probationary employee constitutes a violation of the Act where that discharge is based even in part on that casual's or probationary employee's union or protected concerted activities, *Lafferty Trucking Co.*, 214 NLRB 582, 583-585 (1974); *Amole, Inc.*, 214 NLRB 67, 68-69 (1974).

Otherwise, the Union's joinder of issues in the case is presented on basis of its view that the controlling facts are simply basically contrary to those urged and relied on by the General Counsel, and thus the case is effectively presented by Respondent Union as one to be resolved on the basis of its urged credibility determinations. The General Counsel's evidenced weakness is revealed in perceived (necessarily) selective advancements of certain evidence in conflict and/or inconsistent, including that to be found in certain evidence of even his own witnesses, below.

In that regard however, the fact is no witness advance by either party has proven to be singularly convincing. The matter in the end is to be decided on the basis of weight of evidence that is determined to appear from the entire record as the more mutually consistent and supported, and thus appearing as the more credible, together with all fair inferences that may be deemed to reasonably arise therefrom. In the rare instance where demeanor of a witness was helpful in regard to a matter in dispute, I have so noted. Both parties have called in their respective briefs for certain adverse inferences to be drawn, on stated basis that their opponent had failed to call a material witness.

The General Counsel has called for an adverse inference to be drawn against Respondent Union because of Respondent Local Union 1426's failure to call Hammonds, who is president of Clerks and Checkers Local Union 1766 (clearly a different union and separate legal entity than Respondent), and who otherwise appears of record as on vacation at the time of (the resumed) hearing. Respondent Union in brief has similarly called for an adverse inference to be drawn from the failure of the General Counsel to call CATS' president Shinn, whom it has urged (unpersuasively below) was the principal spokesman for the Employer in the material meeting held on May 15 in Wilmington right after the contract was negotiated in Savannah, Georgia. Neither party called Westbury, who was CATS' operations manager in material times at Wilmington, and who had notified Jones of his (initial) dismissal.

As the General Counsel did call CATS' vice president Gautier (and notably did so despite Gautier's initial failure to appear in response to an apparently lawfully served subpoena), and as the Respondent Union did call Rose, president of ILA Local Union 1338 (also a different union and separate legal entity), who (I find below) was also present, and available, and, in any event, as each of the individuals who were not called to testify by a party was not an agent or individual shown otherwise to be in the control of that party, and was each previously equally subject to a lawful subpoena process of the other party to ensure their availability and attendance at hearing, I decline to draw either adverse inference as urged by the parties on the failure of the opponent party to call either Hammonds or Shinn, respectively. Cf. *Master Security Services*, 270 NLRB 543, 552 (1984). Nor do I draw adverse inference (on my own) on the failure of either party to call (former) CATS Operations Manager Westbury, as the Employer is not here the Respondent.

## B. The Evidence

### 1. The scheduled meeting of May 15

#### a. *The dispute over when the meeting was held*

The next meeting of the (Wilmington) unions with CATS (after they had entered into the contract with CATS in Savannah on May 12) was scheduled to be held at 10 a.m., Monday, May 15. Representatives of the parties met for the meeting in the conference room at *Local 1426's union hall*.

Present were Shinn and Gautier for CATS. Present for the Wilmington unions (only) were respectively President Sloan and Vice President Vaught for Local 1426; President Hammonds for Checkers Local 1766; and (I find, though not without some reservation) President Rose for Local 1838. Both Gautier and Sloan placed Rose there. Vaught testified he thought Rose was there. Rose placed himself there, but in contrast with credible testimony by Rose as to the purpose of this first meeting, Rose did not thereafter recall as much detail of the meeting as did others who were in attendance. In still further contrast, Rose (alone) then recalled an attendance (purportedly with all the others) at a second meeting that he placed later that week, about May 17 or 18 (below), and which the testimony of others did not convincingly rule out.

Under consideration for present resolution is only the dispute of fact over what day this first meeting (after the contract was signed) was actually held, namely, whether on May 15 or 16. Sloan relates the meeting was initially set for Monday morning (May 15), but Shinn had called, notifying (the unions) that his flight got held up, and as a result (as Sloan first recalled it) the meeting was held that afternoon.

Gautier thought it was Tuesday (May 16) that they met, remembering Shinn did not arrive from Jacksonville, Florida (on Monday May 15), until the late afternoon, and that the meeting was rescheduled to the next day. Gautier recalled the meeting was held on that day not only on basis of his (undefined) records, but by his recall of an association of the meeting with his wedding anniversary, which was (apparently) on that day. (No supporting record of Gautier was introduced.)

In subsequent testimony, Sloan then related that though he thought the meeting was held on Monday, he would not dispute Gautier's recollection of it being held on Tuesday. Notably, Sloan maintained firm recollection that the meeting was held in the afternoon, and that it was on the following morning Sloan and Vaught had first visited Employer's facilities. If Gautier's recollection (and Sloan's concession) of a May 16 meeting were to be determined to warrant finding that the meeting was actually held on May 16 (be it morning or afternoon), Jones' notification of termination in the early morning hours that day would have occurred before the transition meeting was even held. On this record I do not view that likely.

Rose confirmed Sloan's initial recollection they had met Monday, May 15, after signing the contract in Savannah on Friday. Vaught, who is responsible for and handles all the referrals for Local 1426, had not attended the Savannah meeting. Vaught recalled congruously he had received a call from Sloan on either Thursday or Friday (informing) that they had reached agreement, and that the first barge would be worked the next week. Vaught confirmed Sloan's (initial) recollection

(and that of Rose) in that he thought the next meeting was held on Monday, which was (apparently) his first meeting with CATS.

Conflicting date aside, the General Counsel contends that all the witnesses have discussed the same meeting. That contention aside, on weight of what appears in the end to be the more mutually consistent, corroborative, and thus more credible evidence, I find, contrary to (the undocumented and associated) Gautier's recollection, and any Sloan-indicated agreement therewith, that the parties *first* met in Wilmington (after the contract was signed) at Respondent Union's hall more likely on the afternoon of May 15. Additionally, I find it more likely that Rose was in attendance.

Inference that Rose missed the first meeting because of the rescheduling is not sufficiently supported on this record. Whether Rose otherwise has just not recalled certain discussions of that meeting concerning individuals that did not directly affect his Local, or whether Rose has mixed up certain of his recalled discussions, particularly on Jones, which Rose ascribed to a similar meeting held later that week, are questions more conveniently to be addressed further below.

#### b. *Disparate views expressed on the purposes of the May 15 meeting*

Gautier asserts CATS wanted its maintenance people protected because CATS had invested a lot of time and money in maintenance facilities; its container maintenance was a big budget item (as is apparently standard in the industry); its (maintenance) people had been trained, were loyal to the Company, and had worked hard and, for continuity of the business, it was to CATS' benefit not to disrupt its maintenance operations by having a complete turnover of maintenance personnel. In contrast, Gautier revealed that two of five named maintenance mechanics had only recently been hired (clearly, during the labor dispute).

Gautier otherwise relates that his own impression at that time was of an agreement of Shinn, himself, and the ILA, *that the ILA would do what they could to protect these people, and bring them in*; though immediately restating it as, *do whatever had to be done in order to protect the continuity of the company*, because it was in their (ILA) benefit as well as CATS, for the Company to succeed. In contrast, Sloan recounts relatedly only that they (the Unions) had promised management that they would try to do everything within their power to make sure the Employer had a smooth transition and operation.

On cross-examination, Gautier testified explicitly that the purpose of the meeting was *not to determine who was going to become a member of the ILA*, and he then clarified that *the Company was open to the Union's discussion of that subject (ILA membership) with its employees*. Gautier summarized, *whether the employees chose to join the ILA, or they were or were not given an opportunity to join the ILA, CATS was open to ILA discussion of that with the people, and giving them the opportunity to do so*.

Though Sloan initially said the meeting was not to discuss or implement a hiring hall as is centrally urged by the General Counsel, Sloan has, in continued questioning, acceded the purpose of the meeting was to discuss transition of the Union on the job in accordance with the recently negotiated contract which contained an already negotiated (exclusive) hiring hall provision. Vaught succinctly recounted the meet-

ing was to find out the amount of men CATS had on full time, and the amount of men CATS was going to employ from ILA. Ross has generally confirmed the purpose of the Wilmington meeting was to get together on the number of men (needed): to load and unload CATS' barges; for the Employer's maintenance and repair of containers; and to work as clerks and checkers for CATS on that particular operation.

In signing the contract, CATS had again agreed ILA would handle the casual/temporary longshore work on the vessels. Gautier also knew that the people that CATS had previously had working the vessels were non-ILA temporary employees, who had all been hired through temporary employment service(s); and whom Gautier has asserted (without contradiction) CATS had brought in for that 4- to 6-week period, clearly corresponding to the period of the parties' labor dispute.

As far as the vessel was concerned, Gautier states understandably, that wasn't a big deal because the vessel was kind of cut and dry. Gautier then explained that it (the vessel loading and unloading operation) starts and stops, it's not continuous, and Gautier asserts CATS didn't have another vessel until the following Friday. If so, Gautier relates plausibly the Company had time to work out the (hiring) details for the next longshore vessel operation. Gautier has cogently summarized that the Wilmington ILA knew how to stevedore; and CATS could (re)order its required (casual or temporary) longshore labor from them, when next it was needed. If viewed from Gautier's stated vantage point, the meeting as being with purpose to centrally discuss protection of maintenance employees appears on its face plausible.

This does not mean the Union has less plausibly viewed the purpose of the meeting more broadly. In contrast with Gautier, Vaught had previously viewed them (the employees doing the longshoremen's work of loading and off-loading the barges) as men (CATS) had brought down to do the work at the time of the labor dispute. Sloan hadn't previously heard of CATS' use of a temporary employee agency. On cross-examination, Gautier affirmed the broader union view that they all understood there would have to be a transition period, and they were to discuss it (local transition issues) in Wilmington in the following week.

As Sloan's prior and main interest was to refer longshoremen to load and unload containers on and off CATS' barges, I credit Sloan that was a subject that the parties discussed. Moreover, I credit Sloan not only that they had discussed the gangs to be dispatched for the loading and discharging of barges, but (relatedly) had discussed the whole CATS' operation down there, including CATS' use of a temporary employee agency during the parties' labor dispute.

However, Sloan also had a clear interest in his Union's filling any required container repair mechanic positions, now having a contract to do so. The terms of the contract are not in evidence. In short, (all) the unions were there to discuss all aspects of a smooth transition on the job, including not only to discuss the details for their resumed supply of casual longshoremen for the loading and off-loading operation on CATS' container barges, but to discuss circumstances for a union transition to supply required maintenance shop employees (and for the checkers union to provide any required checker(s)).

### c. The dispute over Gautier as a joint spokesman

Gautier's account that Shinn and Gautier had both talked about employees in this meeting is generally credited. Sloan's and Vaught's contrary assertions that when they opened the meeting of May 15 that Shinn did most (or all) of the talking on management's side and that Gautier had said very little in this meeting are simply not credited as applied to this meeting.

Apart from credited evidence that Gautier had substantially participated in CATS' discussions, Sloan offered unconvincing reason to support his contrary assertion. Sloan related: they had previously been in contract negotiations with Shinn; when Gautier showed up, nobody knew him, and Gautier didn't know them; so, Gautier didn't have much to say at that meeting. Gautier's seeming presence at negotiations even earlier in May aside, Gautier had attended the negotiations on May 12, indeed was signatory to the agreement; and, contrary to the Union's urging, it appears of record that by this time Gautier also had assigned responsibility over operations, including the maintenance shop.

It is thus far more likely Gautier thereafter jointly spoke (with Shinn) in the parties' discussion of the Wilmington maintenance employees, as Gautier recounts. However, Gautier did not lead those discussions, notwithstanding any indication of that which may be viewed to arise from a review of Gautier's summary accounts of the meeting. E.g., it is more likely Shinn continued as principal participant, and that Shinn began the discussion for the Employer (and made certain other significant statements, e.g., on Whitman's prospective supervisory status), as Sloan and Vaught otherwise have credibly recalled, to the extent found below.

### d. Points of contention, conflict, and confusion—analysis

- (1) Who were named (correctly/incorrectly) as CATS' maintenance employees; how was their status identified (full/part time, permanent/temporary); and to what extent were employees individually, or by job discussed?

There is major record confusion in these areas.

Sloan recalled credibly Shinn started the meeting by saying, "[W]e want to discuss the transition of employees; how we are going to work the barge, and the maintenance facilities." Sloan recalled they then mentioned names of the individuals that CATS had working in the Company's maintenance shop. Gautier relates credibly that it was he who then named the maintenance shop employees. However, significantly, on cross-examination Gautier confirmed he thought he had (at first) *just read off the names of the mechanics (sic)*.

Though Sloan at first couldn't recall the names they had mentioned, Sloan did acknowledge that *they had asked Sloan (initially) if Sloan would agree to allow their men to stay on the job, and that Sloan had (initially) said no, stating he would not or could not (agree to) allow the Company to keep all their men on the job because they had a hiring hall agreement, and Sloan had qualified men.*

As General Counsel's 611(c) witness, Sloan denied that Shinn and Gautier told Sloan that *they (CATS) employed three full-time mechanics including Jones or that they said*

that they wanted to employ three mechanics. Sloan acknowledged otherwise: that they (Shinn and Gautier) had mentioned several names at the table and that Jones' name was mentioned around the table, but Sloan at that time didn't recall any details.

Though Sloan didn't recall Gautier or Shinn give names over again of those they wanted to employ, Sloan recalled that Shinn had told Sloan they had some full-time and some part-time people, and some people they wanted to keep; that they had then discussed certain of the previously named individuals; and that *Sloan had then said he would agree that the Company keep some of them employed*. Sloan clarified that they had then discussed full-time people; that the Union agreed to the Company's continued employ of its full-time employees; and where Sloan had stated his disagreement was in regard to CATS' continued employment of the part-time (sic) employees.

The General Counsel has established for credibility purpose evaluation, in contrast with Sloan's accounts (above and below), and with claimed indefinite recollections by Sloan when called as a 611(c) witness, that in an affidavit Sloan had previously given to the NLRB on August 15 during an investigation of the underlying charge, Sloan had then stated, severally:

On 5/15/89 when I met with Shinn and Gautier they told me who they had working as mechanics in Wilmington. They said they had three full time and two part time mechanics. And, as I recall Ben Jones was one of those people. This is the first time I had ever heard of his name. I had never met Ben Jones as of that date. In addition, Shinn and Gautier asked me if I would agree to allow those men to stay on the job. I said no, that I would not agree to it because we had a hiring hall agreement and that I had qualified men to fill the jobs who were not working. I did not say that I would not accept the men in the Union. I said I would not allow the Company to keep those men on the jobs.

First, Respondent Union would have it observed that the Sloan affidavit does not actually identify Jones as a full-time employee. Second, the Union contends that the fact is that Sloan and the Union had later in this meeting agreed to the Employer's continued employ of all of its *named* full-time employees, and even continued to do so later when the Employer reported it had made an error in naming Smith (who was actually a temporary employee employed by another company) as a full-time CATS' employee, and in failing to name Shutz at the same time as a full-time CATS' employee, below. Third, Respondent contends Jones wasn't named as a full-time employee in this meeting.

To the extent that Respondent has relatedly asserted in brief that neither Gautier nor Jones has actually said Jones was a full-time employee, I do not find such argumentative facts persuasive. Thus although Jones apparently did *not* explicitly testify that he was a full-time employee, Jones did testify that he was employed by CATS when first terminated (on May 16). Although Gautier apparently also did not explicitly testify that he said Jones was a full-time employee *in this meeting*, Gautier did testify Jones was *later returned to full time* (through an Employer NLRB settlement in the fall, to be discussed further below), and Gautier confirmed

that Jones was returned at that time to *the same position Jones had previously occupied*.

There is simply no convincing evidence presented to the contrary, e.g., to warrant a finding that Jones had continued after January as an Olsten temporary employee prior to May 15 when he was terminated. Weight of the above evidence rather indicates that from January through May 15 Jones was a permanent, full-time employee of CATS, and such at the time when he was (first) terminated by the Company. A determination of Jones occupying full-time status, however, is not one to be made on weight of the above evidence without leaving significant factual questions behind it. First, the Union fairly asks a perplexing question in brief, *if not Jones, who was the second part-time (or temporary) employee that is referred to by Gautier (and previously recorded by Sloan)*. Moreover, and in any event, it is not at all clear what the Company had explicitly said about Jones' employment status in this meeting.

Even if Gautier has only hedged a statement to that effect (referring to two part-time employees or mechanics) was one he may have said, Gautier did not deny saying it. Sloan's testimony is that a statement to that effect was said and, indeed, it is only the more notable, with Sloan's past and supportive recorded recollection urged by the General Counsel that the Company had said it had "three full time and two part time mechanics."

However, whether Shinn or Gautier had actually told Sloan or the Union *in this meeting* that Jones was full time or whether Sloan had some cause at the time to actually think otherwise (e.g., that Shinn or Gautier had named three others as full time in this meeting) is a question that is best presently left open. Fourth, in that very regard, Respondent contends in brief that the record shows Gautier didn't actually know at the time who was full time, who was part time, who was permanent, and who was temporary; that Gautier's recollections in these respects were simply confused; and they are wholly suspect. On many of these factual assertions, the Union's arguments appear to have merit.

First, to the extent the General Counsel's argument is made on a credibility basis, e.g., that Sloan's affidavit serves to establish Sloan's awareness of the status of Jones as a full-time employee, it would seem there is too much ambiguity present in the affidavit, certainly on whether Jones is therein being recorded by Sloan as a full-time employee. Indeed, in common writing parlance, Jones would appear more warranted to be inferred identified with the nearest, or the last-named category, thus, as being one of two referenced part-time mechanics. But there is even then a latent ambiguity present on part time being applied to a temporary, non-CATS' employee, if one of two referenced part-time employees is to refer to Smith, as on this record it must.

However, Sloan did *not* testify either to be the stated fact, but rather remained unclear exactly what was said about Jones' employment status at this meeting. Notably, Sloan confirmed that the Company erroneously identified Smith as a full-time employee in this meeting, while not recalling Shutz named at all.

Sloan has specifically recalled that Jones' name was mentioned around the table, but Sloan didn't remember whether it was mentioned as *full time, part time, or what*. Sloan had first recalled generally (as a 611(c) witness), that if he was not mistaken, they (CATS) had mentioned something to him

about they had some people working through Olsten, a temporary (service) agency, which was the first time he heard that name called. Though Sloan acknowledged that temporary (service) is not mentioned in his affidavit, Sloan then only the more firmly stated he was testifying as to what was said at the meeting. In this instance Sloan's demeanor in the firmness and manner of his reply appeared as decidedly the more convincing than an omission in an affidavit otherwise shown to be inaccurate in part, especially when also appearing more congruous with other credited facts of record.

Gautier does not specifically deny there was discussion of CATS' employ of temporary individuals through Olsten. Apart from independent likely mention of such in a discussion of CATS' barge longshoring, when asked directly what he had told the Union about the maintenance employees, Gautier was unsure whether he mentioned at the meeting there were *three to four full-time employees*, or whether (he said) it was *one or two temporary employees* that were employed at the time.

In regard to the general credibility of Sloan's account versus Gautier's account, if Sloan, when initially called as General Counsel's 611(c) witness, has in any implausible sense said he did not recall all the names of those who were mentioned, and thus is to be viewed as having only questionably done so later (in greater detail) as Respondent's witness in resumed hearing, then the General Counsel's witness Gautier, who has asserted his singular interest in attending this very meeting was for the discussion of the CATS' maintenance group, has appeared just as, if not more unreliable, in certain of his related accounts.

Gautier has testified that CATS was keenly concerned about, and wanted to discuss with the Union the protection of its maintenance shop employees. CATS did not want them displaced by someone off the ILA bench. Gautier has asserted that everybody they were interested in (keeping) in their maintenance operation was discussed that day. Gautier initially related that at that time they were talking about *David Whitman, Charles Dobson, Roy Shutz, Ben Jones*, and maybe *Dennis Smith*, but then Gautier immediately added, he didn't remember.

Notably, Gautier didn't recall who of the five named in maintenance was first discussed, didn't recall any part of the order of the discussion of maintenance employees and, surely questionably, recounts he made mistakes in stating the employment status of at least two (Smith and Shutz) of the five in maintenance he has hesitantly asserted he did mention at the time. Although I have no doubt that the Employer planned to keep certain mechanics for the reasons stated by Gautier, I have noted in other context that Gautier revealed that two of the five, Shutz and Smith, were only recently hired about the same time.

Gautier has also said they were all on CATS' payroll full time. However, in that regard, in fact, all the above individuals he has named as mechanics were not all full time, nor all on CATS' payroll full time, e.g., Dennis Smith. Indeed, Smith has never appeared directly on CATS' payroll as an employee. Thus, during all the times Smith has worked as a container repair mechanic at CATS' maintenance facility, Smith testified he has worked there for CATS as a temporary employee, and he was *always* directly employed (and paid) by Olsten.

As noted, the General Counsel has also established that in the prior affidavit given to the Board during an investigation of the underlying charge (and on which the General Counsel has relied heavily, above), Sloan had not made any reference to temporary employees, but only to being told there were three full-time and two part-time mechanics. Be that as it may, there is more convincing evidence (above) that (at least) Smith was a temporary employee employed by Olsten working as a temporary for or at CATS, and (below) that a witness of each of the parties has occasionally indiscriminately, or interchangeably spoken of (temporary employee) Smith as a part-time employee of CATS. (There is even indication the Respondent continued to do so in brief.)

Contrary to Sloan's affidavit reference to CATS' employment of three full-time and two part-time mechanics, General Counsel's witness Smith testified that at all times that he had worked at CATS as a container repair mechanic, Smith was in fact a temporary employee employed by Olsten, and he has never been employed there directly by CATS. Thus (I find) not only that CATS has never employed Smith as a CATS' full- or part-time employee, but to the extent the Sloan's affidavit indicates otherwise, it is inaccurate as to that fact (though not necessarily inaccurate in recording what Sloan then understood of what he had been told by CATS).

The General Counsel's witness Gautier also testified that employees performing the longshoring (barge loading and unloading) during the parties' labor dispute were *all* temporary employees. That fact was not previously known by Sloan or Vaught. It seems inconceivable that the parties would have discussed the barge longshoring transition without some mention by CATS' management of CATS' prior use of temporary employees in that operation; especially with the Union's resumed supply of casual or temporary longshoremen likely to be of prime interest to Sloan and Vaught.

There is no evidence presented that in the affidavit Sloan had denied there was any mention of temporary employees. Despite subject omission in the affidavit, I credit Sloan that there was mention of Olsten's temporary employment service in this meeting. Moreover, Gautier recounted other discussions with confused acknowledgement of his possible use of terms of full time and/or permanent, part time, and/or temporary, including (albeit determined unreliably so on the numbers, below) that Gautier couldn't recall if he said at the time CATS had *three or four full-time*, and/or *one or two temporary* employees.

The Union's witnesses were not much better in identifying the numbers named as full time or part time, permanent or temporary, at this meeting. As Respondent's witness, Sloan has recalled that in the very beginning of this transition meeting with CATS, the Company had said they had a total of five in the maintenance container repair.

Sloan recalled they had said either *two or three of them were full time*, and that they didn't use the term *permanent* at that time. Sloan recalled that in the discussion of the individuals: they had said *Whitman was full time*; and they said *they wanted to keep Dobson on full time*. Sloan (and Vaught) have confirmed (Gautier) that *they had also named Smith as a full-time container repair mechanic in this meeting*. Sloan asserts he had (only) the next day learned *Shutz was a permanent or full-time mechanic (instead of Smith)*.

Sloan later recounted in greater detail, but notably then with substantial corroboration by Vaught, that in this meeting

the Company mentioned *Whitman*, whom Shinn said they were going to make a supervisor (with a further material comment made by Shinn bearing on the reason, more conveniently to be discussed below). Sloan otherwise recalled Shinn said he wanted to keep *Dobson* employed as a full-time container repair mechanic. Dobson had years of experience as a mechanic, some with a predecessor company of, or under King and, in any event, because Dobson had been with the Company since they had started the maintenance container repair. Sloan credibly recounted that Shinn had said that Dobson was highly qualified and that Shinn definitely wanted to keep Dobson on the job.

In that regard, Sloan has testified that the Union then had no objection, and we told him (Shinn), right there in the meeting, that we agreed. Indeed, Sloan related he *told the Employer that he (Sloan) had no objection to their continued employment of any one who was full time*. Sloan has testified that, to his knowledge, *no one in this meeting had referred to Jones as a full-time employee*. Sloan also recalled Shinn didn't mention anything in that meeting about Shutz (or anyone else). Contrary to Gautier's recollection of calling Sloan later that afternoon about an error made on Shutz' status, Sloan didn't recall Shutz' name come up at all until the next morning, when Sloan recalled having a conversation with Gautier about it at CATS' terminal facility, below.

In support of Sloan's assertion of stating to the Company that he had no objection to CATS' continued employment of full-time employees, Sloan would have it observed that he had readily accepted management's identification of those who were its full-time employees, as stated both at this meeting, and (later) when the Employer said that CATS employed Shutz full time, rather than Smith, in clarifying a mistake it said it had made. At this time Sloan didn't (personally) know Dobson, Jones, Smith, or (apparently) Shutz. Sloan had never seen *any* of them before, though he knew (of) Whitman, below.

Vaught did not directly address, and thus does not explicitly corroborate Sloan's statement in this meeting of no objection to CATS' (continued) employ of their full-time employees. However, Vaught has testified that *Shinn had asked the Union to accept Shinn's full-time employees*, and Vaught's testimony not only supported Sloan's recollection of there being two or three full-time employees, in that *Vaught confirmed a company's mention of Dobson and Smith as full-time employees*, with Vaught's asserting that Whitman, though also full time, was never mentioned as a full-timer in that it was only said, *Whitman would be with management*, but Vaught confirmed that after the contract, Union referred three full time.

As above noted, as a 611(c) witness, Sloan had recalled that Jones' name was mentioned around the table, but Sloan didn't at that time recall any of the details. As Respondent's witness, Sloan later testified, to the best of his knowledge, that Shinn said he was going to put Jones on the road traveling, surveying equipment. On cross-examination, Sloan acknowledged that there was nothing in his prior affidavit about Jones' driving around. However, Vaught's recollection of the Company's mention of Jones confirmed that Shinn said Jones would be doing some surveying for him, because Shinn had a lot of (container) boxes that he needed to be inspected to be repaired and, relatedly, that Shinn had mentioned Jones would travel to Charlotte and Savannah.

Gautier's assertions, insofar as they indirectly bear on the status of Jones as full time, are not advanced materially by Gautier's claim of his general awareness of the names of all CATS' employees, or any indicated listing of five maintenance employees (that included an Olsten temporary). It would appear as only the less so in light of Gautier's other relation that he couldn't remember if he was aware of Jones' prior (1988) employment as a temporary employee, and in the light that of five maintenance employees that were purportedly named because of deep company concern, there has been stated mixup on two, namely, temporary employee Smith and asserted full-time employee Shutz, because *both* were only recently employed about the same time, especially where it is only hesitatingly asserted that five were named, and it is established (at least) one of them was never employed by CATS directly.

It is clear that both Shutz and Smith had begun work as container repair mechanics at CATS before the contract was agreed on. There is no documentary evidence presented on the respective employments of Smith and Shutz.

The record is unclear who might have been a second part-time employee that Sloan's (and Gautier's) testimony and Sloan's affidavit might refer to. The record is unclear who might have been a second temporary employee that certain other of Gautier's testimony could potentially refer to. Other than Smith, Jones is the only one affirmatively shown previously hired in maintenance as a temporary Olsten employee, but of record appearing not such since January.

Whitman is identified as a full-time CATS' employee being made supervisor. Dobson is clearly identified as a full-time CATS' container repairman from the start. Witnesses of both parties assert error was made in naming Smith as a full-time employee and eventually corrected with the naming of Shutz (in place of Smith) as the full-time employee. Though Shutz was only recently hired at about the time Smith was, on this record only Smith is shown not full time, as well as employed through Olsten. (Gautier related Smith and Shutz were hired *at that time within days or weeks of each other*.) There is no evidence of record, let alone clear or convincing evidence, that Shutz had ever previously been employed by or through Olsten. *Indeed, by weight of the record evidence such as is presented from both sides, the evidence appears only to the contrary of Shutz ever being either a CATS' part-time employee or an Olsten temporary employee.*

There is also confusion over whether three or four full-time employees were mentioned by CATS in this meeting. With Whitman and Dobson clearly identified as prior full-time employees, and with Jones identified of record as at least an *actual* full-time employee of CATS since January, Shutz would have then been a fourth full-time employee. This was (at best) unsurely recalled by Gautier and clearly by no one else. It compares unfavorably not only with Sloan's related two or three full-time mechanics (which may be discounted as more likely self-serving hedging recollection), but is contrary more notably with Sloan's more credible affidavit recorded company report of having three full-time and two part-time mechanics.

On weight of evidence that I in the end deem the more credible, I do not credit any Gautier indication that CATS' management had stated in this meeting that the Company had four full-time employees employed in its maintenance facility. But neither do I credit indication in the Union's wit-

nesses (Sloan and Vaught) that the Company mentioned only two full-time mechanics. Rather I conclude and find the breakdown of three full-timers as stated in Sloan's recorded recollection in affidavit of August 4 is the more likely number of full-time individuals that the parties *had discussed* at that time, *and* (I further presently find) that Whitman was one of them as was clearly Dobson. The question remaining open is whether it was Jones or Smith (erroneously) named as the third full-time employee. On state of record evidence, I am led to conclude, if his name was mentioned at all, Shutz was not named as a full-time employee *at this meeting*.

In explaining the error he had made at the meeting, Gautier related he had not remembered *whether Shutz or Smith was a part-time employee*; that Gautier had told Sloan at the meeting that it was Smith (sic, disjointedly at the hearing); only to later find out, when Gautier got back to the office and had his management recheck the payroll records, that in fact, Shutz was the guy who had been *permanent* (sic) and *Smith* had been *part time* (though Smith, as found, was an Olsten temporary).

In contrast with Sloan's view that the parties had resolved the transition at the meeting, Gautier has testified (disjointedly), "[W]e left there with some things up in the air to be discussed and rehashed." Gautier continued,

*I think we had one or two employees that were in our employ who were temporary at the time, who were not full time, and when I got the payroll information from my management people who were in charge of the shop, I got it backwards and subsequently I had to get in—I didn't remember who was full time and who was permanent and we had to straighten all—but, it had nothing to do with Jones or Whitman. I think the confusion was between Shutz and Smith; and, we had to get that straight so we just left it for further discussion.*

To the extent any of Gautier's above testimony would suggest that Gautier, or any one else, had discussed *at this meeting* a potential mixup on the status of Smith and Shutz as full-time employees, such appears inconsistent with the weight of far more consistent and mutually corroborative, and thus determined more credible, evidence, and it is accordingly not credited.

There is not insignificant confusion in the record even otherwise as to what type employee the parties were actually referring to (apart from whether or not so intending), in variously having referred to part-time (and full-time) employees in describing this meeting. E.g., it wasn't just Sloan who in that respect has referred to a clearly temporary employee as a part-time employee. (Nor would a temporary employee working full time appear to necessarily involve an inconsistency in the state of this record.)

The fact is (and I find) that Gautier has used interchangeably (and confusedly) part time and temporary (as well as full time and permanent). The fact also is, apart from presently resolving any issue of whether they were consciously doing so, *both* Sloan and Gautier have referred to (at least) one established temporary mechanic employed by Olsten, as employed by CATS part time. Wholly apart from lack of witness clarity, if not record confusion on numbers identified as full-time employees as compared with permanent employees, and on number of part-time employees, as compared

with those occupying temporary status, is the very question of credulity of an asserted misidentification of a temporary employee (Smith) as a full-time employee in place of Shutz.

Apart from the asserted Smith/Shutz error made, there was identified as full-time employees at this meeting Whitman, Dobson, and Smith. On at least one other occasion, Gautier related that he did not recall whether it was three *permanent* (as compared with otherwise stated full time) and two part-time (as compared with his earlier referenced one or two temporary) mechanics, adding he is not denying it may have been (so stated).

In the end, Gautier's testimony is simply not clear enough of record on exactly what CATS' management had said during this meeting either about specific numbers of full-time and part-time employees CATS then employed; nor, is it persuasive that he had definitively informed the Union(s) about full-time or permanent status, or part-time or temporary employee status of *all* the maintenance employees named. I am rather convinced they went on to discuss individuals.

Gautier has not testified that he identified Jones as a full-time employee *at the meeting*, beyond his confirmed recollection that he had named the five individuals in maintenance, with (erroneous) assertion all shop people were on CATS' payroll full time and later (hedged) general assertion that he did not remember whether it was three or four full-time employees that he told the ILA that CATS then had. To be sure, on this record four full-time employees would have necessarily included Jones. However, in the above circumstances of his other testimony, I am not prepared to selectively conclude that Gautier had explicitly named Jones to the Union as a full-time employee of CATS in this meeting. Rather I shall look further to the Union's testimony.

No union witness has testified that the Company identified Jones as a full-time employee *in this meeting*. Ambiguity in Sloan's affidavit on Jones as full time or part time does not advance any urged union awareness at this meeting of Jones' as a full-time CATS' employee. *Sloan then has, with record consistency, recalled no company mention that it wanted to continue employment of Jones as a full-time employee in this meeting.* A related assertion of Sloan that if the Employer had identified Jones as a full-time employee that Sloan would have had no objection to the Company's continued employ of Jones, however, is to be given little probative weight, as in nature largely self-serving. However, warranting separate treatment is consideration of the evidence of the Union's position actually taken on the Company's later report of its reemployment of Jones full time in his old job as a part of the Employer's settlement of certain unfair labor practice charges brought by Jones against the Employer (below).

Neither Whitman, Dobson, nor Shutz testified in this proceeding. Setting aside momentarily whether there was a reference by Gautier to three or four full-time container repair mechanics in this meeting, or as Sloan has related at the hearing two or three (with Vaught's testimony supportive of two, and Whitman full time, but a supervisor), seemingly more consistent with Sloan's recorded three full-time mechanics in his affidavit, Sloan related at the hearing that three mechanics were referred that afternoon. Their names are not specified of record. The record reveals only that Whitman, Dobson, and Shutz were employed in the immediately following days. Only Dobson and Shutz are shown clearly to

have worked in the maintenance facility the next 2 days. Jones and Smith as clearly did not.

(2) Disputed discussions in the meeting about  
Whitman and Jones

Gautier asserts that two people were discussed at this meeting over which Gautier was distraught, namely, Whitman and Jones. I readily discredit his claimed condition as to Whitman. Gautier more plausibly asserts Sloan told Shinn and Gautier that these two people would not be accepted by the Union. According to Gautier, at that time Sloan specifically told them to forget about these two guys, we can't discuss them, they would not be accepted in the ILA.

There is major conflict on the above and certain other related material (but uncorroborated, and denied) statements that Gautier has attributed to Sloan in this meeting, particularly with regard to Whitman and Jones. It is independently warranted to presently note that Gautier's reliability in these crucial areas was itself shown open to serious question with observation that though Gautier later testified that certain related charges brought against the Employer by Jones were settled, and that they were settled by Gautier's decision, on advice of counsel, Gautier then (without claim of privilege) asserted that he could recall none of the details why he did so. The assertion was deemed incredible when it was given and appears only more so on review.

(a) David Whitman

In apparent continuation of a theme of party discussion in this meeting including the subject of the Union's bringing in CATS' maintenance employees (into the Union), Gautier initially asserted that he was *taken aback in the meetings, by the fact that two people (in that respect) were singled out, Whitman and Jones*. Gautier relates Sloan told Shinn and Gautier to *forget about these 2 days, "we can't discuss them they would not be accepted in the ILA."* Shinn did not testify in this proceeding. Shinn thus does not afford corroboration to Gautier in any of the above respects. Nor does anyone else who attended that meeting, and who has testified.

Gautier's account was notably ILA generalized, namely, that Whitman had filed assault charges against one of the ILA people because, as Gautier understood it, Whitman had been assaulted on the dock during the ILA strike when on one occasion things got boisterous, and they (ILA people) had charged the gates and wound up on the dock and the police were called in. Gautier's belief that he had later learned of the name of the individual (ILA member) involved did not add specific awareness on his part of involvement of a clerk in a purported assault of Whitman.

It is notable even at the outset, that Gautier alone has ascribed such a statement to Sloan, and even then does so only in context of a purported Sloan response to CATS' stated openmindedness to an ILA discussion with the Employer's maintenance people of an opportunity to join the Union(s) and, as apart from considerations of, if such opportunity was to be afforded by the Union(s) and chosen by the employee.

In an apparent substantial exaggeration, if not inconsistency therewith, certainly as applicable to assertion of being taken aback, Gautier has revealed that the Company not only previously knew of Whitman's problem with an ILA member, but at that time the Company had already contemplated

making Whitman a supervisor, which would bring Whitman out of the jurisdiction of any job classification that would come under the ILA (and out of any unit inclusion). Moreover, Gautier conceded his prior awareness that there was bad blood between Whitman and a member of the ILA, over an alleged assault of Whitman by the ILA member in an incident that had occurred on the docks during the parties' earlier dispute. Indeed, Gautier related that at the time (of the meeting) he had said he could understand how Whitman could be a problem for the ILA.

Nonetheless, Gautier denied it was the Company that had brought that (the Whitman-clerk incident) up in this meeting. Indeed, Gautier then asserted it was Sloan who had brought up in the meeting that there had been problems with Whitman and "his rank and file." Gautier stated that he did not know the individual involved, though asserting he had learned of his name later. Sloan relatedly testified, consistently and categorically, that at no time during this May 15 meeting did Gautier confront Sloan regarding Whitman, or any of the other men named. However, Sloan's additional assertion on Whitman was not without question, namely, that the ILA incident with Whitman is an incident that involved clerks, did not involve his members, and was in fact no concern of Sloan, as it did not concern his members.

In support of his version of the discussion of Whitman at this meeting, Sloan has testified that at the time of this meeting Sloan didn't know any of the men when named. However, Sloan acknowledged that he did (previously) know Whitman. Initially, Sloan stated it was when he was earlier down in Miami, Florida, on another negotiation, that he had first heard about Whitman. Sloan recounted that he had received a call that there were some problems, and *some guys (sic) were arrested*. However, Sloan (seemingly) then related that it was when he came back the next day, he heard there was a management man and a checker that had some problems, that he heard about David Whitman and David Seaton, a checker, and that Whitman, whom Sloan identified as also a checker, had taken out a warrant on him (Seaton) or something.

Sloan has identified Whitman as a checker solely on the basis that they (CATS) had told Sloan that they had Whitman down there checking at the time. Sloan relates that he didn't get involved with that (Whitman-Seaton incident) because it did not involve his members. I do not find Sloan's underlying assertion for his recollections, that Whitman was a checker, convincing.

As noted, Sloan had previously recorded in affidavit form that the Company informed the Union in this meeting that the Company had three full-time and two part-time *mechanics*. That CATS may have also informed Sloan that the Employer had used Whitman as a checker at the time of a labor dispute incident between Whitman and Seaton does not mean that Whitman did not occupy maintenance mechanic status prior to and after that incident, as initially named at the meeting. If Whitman wasn't named as a mechanic, then the five mentioned mechanics have not been identified of record.

Neither Vaught nor Rose has confirmed Sloan that Whitman occupied checker status. In contrast, not only has Gautier initially listed Whitman in this meeting as one of five maintenance employees, but Gautier has also asserted that there was subsequent use of Whitman in maintenance at Savannah (below). I do not credit Sloan's claim that Whit-

man's status was that of a checker, though Sloan may well have been told by the Employer that it had Whitman working down there as a checker on the occasion of the assault incident. Sloan's use of that circumstance I find was itself more likely opportunistic. Neither am I persuaded, nor do I credit on this record, that Sloan was not concerned because his membership was not involved, because it was a matter between checkers or involving members of the Checkers Union. That some of Sloan's union membership was present at the time of the incident would appear as at least more probable on this record.

Sloan testified, here with substantial corroboration, that management's statement on Whitman at that meeting was one of just informing the unions what CATS was going to do with Whitman, namely, Shinn said that they had decided to put Whitman on as management, making him a supervisor or company man. Sloan later testified (consistently) that the only other thing that Sloan remembered about Whitman was Shinn's telling them the Company had decided to put Whitman on with management, *because Shinn knew there were some problems between Whitman and David Seaton, a clerk.* Sloan testified that he (Sloan) didn't say anything in reply. Neither did Sloan recall Clerks and Checkers' president Hammonds, or any one else, say anything in this meeting about Whitman.

Vaught specifically confirmed Shinn's mention in this meeting that Whitman would be with management. Vaught otherwise generally corroborated Sloan on Whitman in testifying that to Vaught's knowledge neither Sloan, Hammonds, nor Rose had ever made *any* comment about any employee, or anyone by name, during that meeting.

#### Some Preliminary Conclusions on the Whitman Discussions

Sloan's statement of having no interest or concern in the Whitman-Seaton incident because the incident was basically between checkers is discredited in certain predicated assertions above. Gautier's claim that the Union's comments on Whitman (i.e., on membership nonavailability) produced a distressing effect on Gautier was even more unconvincing. Gautier's account of being distraught over the Union's position on Whitman was simply inconsistent, and (I find) an unconvincing overdramatization, as appears evident when it is compared with Gautier's acknowledged prior awareness of the Whitman-Clerk incident, including CATS' current plan to make Whitman a supervisor on that account. Any intervening union statement aside, I credit Sloan's (corroborated) recollection of what CATS' management had said of Whitman, namely, that Shinn announced in this meeting that CATS was making Whitman a supervisor because Shinn knew there were some problems between Whitman and David Seaton, a clerk. In regard to the intervening union statements, I need not resolve whether Sloan or Hammonds (or neither) had earlier said, after Whitman's name was first listed as one of five mechanics (and/or as part of a response in a discussion of CATS' openness to the Union's contact of its employees about union membership), that there were problems between Whitman and "his rank and file," though in that regard, not only is Sloan corroborated that he did not do so, union witnesses have also denied Hammonds voiced any concern about any problem arising between Whitman and his membership. However, I am convinced Shinn's supervisory an-

nouncement was not preemptive, as union corroborative testimony would seem to indicate.

If a clerk's involvement in the altercation with Whitman as compared with presence of some Sloan members on the dock when the Whitman incident occurred renders an interim mention of problems between a membership and Whitman as less likely emanating from Sloan than from Hammonds, the reported concurrent remarks to the effect Sloan told Shinn and Gautier to *forget about these 2 days, we can't discuss them, they would not be accepted in the ILA* is no less the more likely of Sloan's origin *if* the point of discussion was in response to Gautier's asserted company inquiry (request) made of Sloan that the Union protect its mechanics by acceptance of CATS' full-time mechanics into membership in the Union, as seems from the weight of Gautier's evidence to have been CATS' request being made of the Union in this meeting. Any inconsistency aside, the clear thrust of Gautier's account is that the Union was being asked to accept CATS' full-time mechanics into union membership. In contrast, though Sloan's and other union witnesses' accounts are that the Union was being asked to accept CATS' continued employ of its full-time maintenance employees, they do not explicitly deny any membership discussion.

The fact is three of the five named mechanics (Whitman, Dobson, and Shutz) continued in CATS' employ on a full-time basis, starting the next day. Although Whitman did so as a prospective supervisor, he continued to perform maintenance work (e.g., in Savannah), and Shutz did so assertedly in place of a temporary employee Smith, theretofore reported and accepted by the Union as full time, and interimly corrected as not such. It is allegedly only Jones who as then a full-time mechanic on CATS' payroll that the Union wouldn't allow to be continued as such.

#### (b) Ben Jones

Gautier materially recounted in support of the complaint allegation that the one that had really floored him was Jones, and Gautier asserts he still didn't understand why there was any reticence on the part of the ILA management at that time *to accept Jones into their rank and file.* Gautier has explained middle management at CATS, naming both Westbury, predecessor Donnie King, and (employee) Charlie Dobson, had all spoken very highly of Jones.

Gautier added: Jones was a hard worker; always did what he was told, when he was told; didn't abuse his privileges; was always punctual at lunchtime; and Jones willingly worked overtime when requested. Gautier then asserted he had never heard of Jones' making any trouble, and he didn't think he'd ever heard 30 words out of the man in the year that they worked together. The year last described would have by far most of its period occurring after May 15, because Gautier didn't arrive as a consultant until April. (The statement is seen to be more a clear instance of Gautier's penchant for loose and imprecise fact recount in this record, here an obvious anachronistic embellishment.)

Gautier asserts he explained that to the ILA at the meeting, and Gautier then specifically asked them why; to please give Gautier a reason, what's wrong; and that they couldn't tell Gautier any concrete facts; (they said) *just things that they had heard in the rank and file; and made comments that Jones was known within the rank and file as a troublemaker (which Gautier later asserted to have been Sloan's word),*

and that Jones had done this or (sic). However, in an affidavit given before the EEOC on August 4, Gautier recorded that he asked Sloan why Jones was not acceptable, that Sloan said Jones was a troublemaker, and that is all he said. The latter appears as substantially inconsistent with Gautier's hearing accounts.

At the hearing, Gautier continued that he had again asked what; said give me a specific; and (said) like he knew Whitman had had an altercation with one of the ILA members on the dock, okay, and so (he asked) what did Jones do, and what specifically did this man do that makes you think he's a troublemaker, because we never had any trouble with him. Gautier asserts he also made the comment at the time that he thought it was irresponsible.

Gautier then said, he could understand the Whitman thing, but he thought that it was irresponsible (of the Union) to make comments disparaging of Jones' character without any foundation, and without facts, why Jones would not be accepted. In that regard, Gautier related that he (seemingly at some point later) asked various people Gautier knew around the dock in the stevedoring business, and (found) Jones had a good reputation, and so, Gautier asserted to this date, he just didn't understand why.

In regard to Jones, Sloan has specifically denied that Gautier at any time had admonished Sloan for making any comments about Jones. Vaught has generally supported Sloan in testifying (at least) in regard to this meeting, that to Vaught's knowledge neither Sloan, Rose, nor Hammonds had made any comment about any employee, or anyone by name, during that meeting. Presently, I do not credit Gautier's protestations in this area over Sloan's and Vaught's denials.

### (3) Other factors

#### (a) *An alternative facility was under active consideration*

Though not discussed at the meeting, Gautier relates that the Company had an alternative under consideration at the time, namely, a maintenance facility off port, to be manned by the same personnel, and which ostensibly would have fallen outside ILA's jurisdiction for maintenance and repair of equipment (and of which Gautier understood Sloan was subsequently made aware). However, after looking at the economics of moving containers in and out of the facility, the incurrence of additional trucking charges, the sheer logistics of running two facilities, and the Company's being in the financial situation that it was then in, economically, that (alternative) was (determined) not feasible.

#### (b) *Other economic considerations at play*

Even more pressing economic considerations were then operative. Gautier has significantly revealed that though the above Wilmington maintenance problem was a big problem for CATS, it was not the only matter then being considered. At this time, the Company had been in operation for some 8 months; and it was already \$3.5 million in the hole. The Employer had customer service, marketing, and other operational problems in Puerto Rico; it had this labor dispute; and it had just opened up the Savannah operation that had required Gautier's traveling back and forth to Savannah (as well as the above problems requiring him to travel back and forth to Puerto Rico). Thus, Gautier has testified credibly

there was a myriad of things going on (pressures) involving Shinn's and Gautier's efforts to bring the Company into general profitability.

### 2. Gautier's late afternoon call to Local 1426 on Shutz

Gautier asserts he called Sloan that afternoon on the telephone to talk about Roy Shutz as a full-time employee. Gautier otherwise relates, he told the Union later that afternoon that Shutz occupied a full-time employee status, and he asked the Union to put Shutz on as a *permanent employee*, because he had mixed up Shutz and Smith at the meeting. According to Gautier, Sloan did not immediately agree as there was something, *which Gautier then could not recall*, that had to be checked out. Vaught's recollection has Shinn's making a call late that afternoon to Vaught, reporting a mistake was made on Shutz, who was a full-time employee, and Sloan recalls no discussion of Shutz in the meeting and a conversation with Gautier the following morning at CATS' facility. Vaught's and Sloan's accounts conflict with Gautier's, and both such conflicts would suggest Shinn made the call to Vaught. Be that as it may, it is more likely a CATS' contact on the Shutz matter was later that afternoon with Vaught not Sloan.

Gautier asserts, in offered justification of his partial recollection, why else would he have employed Shutz on a (special) job for 2 weeks. Thus, Gautier relates that he also told the Union that until they could get all of that straight, and Sloan could make a determination on what the ILA was going to do, *they were going to hire Shutz directly*, and put Shutz on some special projects, until they could work out the transition. (At this time, CATS was leasing and buying equipment up and down the east coast for the operation.)

Gautier relates he allowed CATS' local or midmanagement to put Shutz directly on CATS' payroll and to put him on the road to go inspect and repair equipment in Baltimore, and as far north as New York, and that when Shutz came back, everything was sorted out. In contrast with Gautier's recollection above, it is clear on the record that Shutz had remained working in the maintenance area at the Wilmington facility during at least the next few days of that week.

Weight of evidence that is deemed the more credible has convinced me, and I accordingly find that the first Company call to the Union asserting a mixup on Shutz was to Vaught, not Sloan and promptly agreed to by the Union, if not that afternoon by Vaught, at the latest in a conversation between Gautier and Sloan the next day. Thus I find a CATS' call was more likely received at the hall that afternoon by Vaught as Vaught (otherwise) recounts. I further find what had remained to be checked out that afternoon, if anything, was more likely a matter of Vaught's effecting Sloan's notice of the Company's report of a mistake made on Shutz as a full-time employee and Sloan's OK on a change.

### 3. The related question of a traveling work assignment to Jones

Although not initially recalling it when testifying (as the General Counsel's 611(c) witness), Sloan later related Shinn had stated something about Jones in this (May 15) meeting, namely, that Shinn was going to put Jones on the road traveling, surveying equipment. Sloan then recalled that they had

said that they had a lot of equipment that was damaged—some they didn't know where it was—and that Jones' job would be to survey the equipment. In that regard, Sloan related (without contradiction) that surveying the Company's equipment is a management job, not covered by the contract.

Finally, Sloan has testified that even if Jones at the time was a full-time employee, since Shinn had told Sloan what (nonunit) job Jones would be doing, Sloan thereafter had no reason to continue discussion of Jones. Vaught corroborated Sloan in that Vaught remembered Shinn saying that Jones would be doing some surveying for him because he had a lot of boxes that needed to be inspected to be repaired, and Vaught recalled that Shinn mentioned Charlotte and Savannah. Respondent's witness Rose has confirmed that Jones' name was discussed in connection with travel, but he (only) not at this meeting; rather at another CATS' meeting with Sloan, Vaught, Hammonds, and himself, that Rose recalled was held later that week, around May 17 or 18 (below).

The General Counsel's established reference to Jones' traveling and surveying equipment does not appear in Sloan's prior affidavit. Moreover, Gautier denied that in this meeting Gautier had announced that Jones was hired to go up and down the road. However, Gautier acknowledged that there could have been other meeting(s) held that week. Gautier also admitted Jones was subsequently hired to go to work in the Savannah stevedoring operation. It is clear Jones did other work as well.

Sloan states employment matters were essentially resolved in this meeting, and the final outcome of the meeting was that CATS would place an order that afternoon to the Union's hall. Sloan also recalls that the Union posted the order on the board, and the Union sent (sic) qualified mechanics down there the next morning. As noted Jones received word from Westbury in the early morning hours of May 16 that Jones was no longer employed at CATS.

Only two container repair mechanics (Dobson and Shutz) are shown clearly of record employed at CATS' facility on the next day. It is unclear whether Whitman was immediately sent to Savannah. It is in any event clear of record that neither Jones nor Smith was employed there the next day (whether May 16 or 17). Smith recalled he was not employed at CATS until a week or two later, when Smith once again was employed there as a temporary through Olsten, as was (assertedly) Jones at some point. (If Jones was employed earlier than Smith, it was clearly not the next day.)

#### 4. The May 16 Jones-Sloan conversation

As noted the Unions had promised CATS a smooth transition and operation. Sloan asserts in that regard that they went down there each morning during the first week of that operation to make sure that the operation was going smoothly. On the morning of May 16, Jones went to CATS' premises. Jones relates he had a conversation with Sloan that morning somewhere between 8-9 a.m., outside CATS' gate at the state port authority.

Jones relates that he assumed that Sloan then knew Jones was a (former) CATS' employee. Jones' version of their conversation is that *Jones asked Sloan why Jones wasn't accepted into the Union, and Sloan told Jones that some of the members of the longshoremen local had said Jones had made some comments about or to some of the brothers up at the Sportsman's Club. In subsequent cross-examination,*

*Jones denied Sloan had also said that the only thing Sloan had ever heard about Jones was (something) through the Sportsman's Club.*

In passing I note Jones' account does not assert Sloan said or implied Jones' comments made about or to some of the (Union) brothers who were in attendance at the club, were about union or any other protected concerted activity matter, or about Jones' refraining from same. The Sportsman's Club is a black-owned club where a lot of longshoremen (ILA) members spend their time after hours, but it is not attended exclusively by them, as Jones, who was never a member of the ILA, was there. (Sloan is not a member of the Sportsman's Club, and he has only been there a couple of times. Though Jones has attended the club, the record does not indicate how often.)

Sloan and Vaught first visited CATS' premises the morning after the Union's afternoon meeting with Shinn and Gautier. Sloan's version is that on his way in to CATS, a gentleman (accompanied by another man), whom he later found out was Jones (and Smith) approached Sloan and said, "[H]ey Willie, can I see you a minute," or "Willie, can I talk with you?" At that time Sloan said that he was in a hurry, that he had some guys working in the facility, and that he had to go in and talk with them first and make sure the operation got started smoothly and/or make sure they got to work. Sloan went into the facilities to try to get everything off to a good start.

Sloan denies that he or Vaught went out to the docks for the purpose of interviewing or soliciting individuals to join the Union. Indeed, contrary to Gautier's view of the same or claimed report of such observation by another, Sloan has testified that Sloan has *never* interviewed anybody to join the Union. Sloan acknowledged that he may have introduced himself to the (maintenance) men (working) that morning, and talked with the men to make sure everything went smoothly, but Sloan asserts that they didn't have any conversation (about the Union) that day. There is no offer of evidence from Dobson or Shutz to the contrary.

Sloan otherwise confirms that Gautier saw Sloan out in the yard, and when he did, Gautier called Sloan and asked if Sloan would stop by his office before he left. Sloan did. According to Sloan, Gautier told Sloan on this occasion that he had forgotten one of his full-time employees, Roy Shutz. Gautier said, he was sorry, and that he knew Sloan might not want to accept it, but they had forgot a full-time employee.

Sloan asked pointedly if Shutz was a full-time employee and, when Gautier said yes, Sloan said, "[I]f he's a full time employee, we won't have a problem, providing you're not going to let one of the guys go that you already ordered." Gautier said, "[W]ell, that ain't no problem, we want to keep Shutz on, plus the guys that they ordered from the Union Hall." Sloan then told Gautier it wasn't a problem.

When Sloan started out from CATS, and headed toward his car, Sloan has Jones again approach Sloan. Sloan relates that Jones then told Sloan who he was. In that regard, Sloan at first related he thought Jones also said something to Sloan about the fact that CATS had let him go, or somebody had told Jones he couldn't work there any longer, but Sloan was not positive of that.

Sloan's version of the conversation that followed is that *Jones had first asked Sloan what did Sloan have against Jones, and Sloan told Jones that Sloan didn't have anything*

against Jones. Notably, Sloan has confirmed that Jones had then asked Sloan why he couldn't get accepted in the Union. Sloan's version is Sloan then asked Jones, "[W]ho said that you can't be accepted in the Union," and that Jones had said, "that that's what he heard, or something."

Sloan later recalled hesitantly, and thus less convincingly, Jones said he had heard it, "Westbury or somebody had told Jones that he couldn't be accepted into the Union." (Sloan subsequently related he didn't know if it was Jones who had told him that morning, or somebody had told Sloan later, i.e., at an EEOC hearing Sloan attended, that Westbury was the one that had called Jones at his house, and told him he was fired. In any event, Sloan has specifically denied, without contradiction, *as of this time* ever having had any prior conversation with Westbury. It is uncontroverted of record that Operations Manager Westbury had not attended the meeting with the Unions the day before.)

Sloan asserts that he then told Jones, "*it's never been discussed,*" and that Sloan also told Jones, "*I can't tell you whether you'd be accepted into the Union or not. I don't have that authority.*" Sloan recalled only further at first generally that Jones had asked a couple of more questions, and Sloan then walked on off to his car and left, asserting, that he didn't tarry but just a minute there.

Although at first, Sloan asserted that that was basically it, Sloan later recounted, contrary to a Jones' denial, *that he did tell Jones that Sloan didn't know Jones; that he didn't know anything about Jones; and that he said that he had just heard one of his members say they had seen Jones up to the club, or something on that order.* (On cross-examination, Jones had earlier also flatly denied that Sloan had said, "I don't know you; I have never met you.") Sloan later repeated that this was the first time he had seen Jones, and that during this conversation, Sloan had told Jones that Sloan had *nothing against Jones*. On other occasion, Sloan related that he said, "*I don't know you. I don't even know who you are, why would I have anything against you.*"

Sloan asserts that at this time, he was just trying to let Jones know that Sloan didn't know Jones, didn't have anything against Jones, and that Sloan couldn't have anything against Jones, when Sloan didn't know Jones. At the hearing Sloan related *that he had said to Jones that the only thing he ever heard about Jones was that some members had mentioned his name, said they heard his name mentioned, or seen him at the Sportsman's Club or something.*

Sloan has testified, in explanation of the latter remark, that what he was telling Jones at the time was that he was trying to show Jones that he didn't know him, so why would he have any reason to be against Jones, if he don't know him. Called as a witness by the General Counsel to support Jones, Smith's testimony (and notably without any cross-examination by Respondent) was at best only limitedly persuasive or supportive.

Initially, Smith recounted that *Jones asked Sloan, "[W]hy couldn't we [sic] accept him in the Longshoreman Union (with) the rest of the fellows that was working.*" (Smith was not a member of the ILA.) Smith then related (contrary to Jones' account) that Sloan said that he heard that "*we [sic] was talking about the Union and the fellows,*" but otherwise (this time) more in accord with Sloan's assertion of statement that Jones' acceptance in membership in the Union was not up to him, namely, that Sloan said, *he didn't have noth-*

*ing to say about it,* and that Sloan had then turned and walked away. Smith next recounted that when *Jones asked Sloan, why wasn't he accepted in the Longshoreman, with the rest of the guys,* that Sloan said this time that "*he [Sloan] heard what we [sic] was talking about, the Longshoremen and the fellows*" (but, seemingly relating back to the membership subject) that *Sloan said he didn't have nothing to say about it,* and that Sloan had just turned and walked away.

In being asked to recount (clarify) the incident a third time, Smith then (disjointedly) related, Jones asked, "*[W]hy come we accepted [sic] to work with the rest of the fellows in the Longshoremen,*" that Sloan said nothing to Jones, and that Sloan turned and walked away. When then finally pressed (a fourth time) by the General Counsel as to what Sloan had said to Jones before Sloan walked away, Smith replied generally that Sloan told Jones every word Smith said before, and then Smith recounted (again contrary to Jones), that Sloan said that he (Sloan) heard that *he (Jones) was talking about the fellows in the Longshoremen and he was talking against them,* and that Sloan had just turned and walked away after that and *didn't have nothing else to say.*

In the above circumstances, I decline to credit Smith's account(s) beyond his support of Jones that *Jones had asked Sloan, why wasn't he accepted in the Longshoremen with the rest of the guys.* I specifically do not (selectively) credit any Smith recount of Sloan's saying, in substance or effect, that Sloan heard Jones was talking against the Union or its members. In my view, these are not minor variations in Smith's testimony.

##### 5. Alleged union interviews of Dobson and Shutz, union membership inquiry by Dobson and Shutz, not extended to nor sought by Jones

Sloan relates that they (the Union) did talk from time to time with the men, including maybe that day, as they had to talk because the guys was just getting started on a new operation, and the Union wanted to make sure everything went smoothly. Sloan otherwise relates he did go back the next day; indeed, he went back every day that week. On the next (second) day that they were at CATS' facilities, (I find) May 17, Wednesday, Sloan testified that Dobson and Shutz approached Sloan and asked how they'd go about joining the Union.

Sloan's account is that they were the only employees to approach and ask him for the procedure to go through to get in the Union. Sloan testified that Dobson and Shutz told Sloan they wanted to sign up for the Union and wanted to sign a dues card. Sloan then told them the procedure for joining the Union. Sloan did not sign them up right then and there, testifying that he couldn't do that. However, Sloan explained the procedure to them that must be followed when individuals wish to become a member of the Union. The men have to first write a letter to the Union requesting membership. That letter goes before the Union's executive board. The Union's executive board makes a recommendation to the full (union) body, which then either accepts or rejects the letter with its recommendation.

Sloan has testified (without subsequent contradiction) that Dobson and Shutz thereafter went through this procedure. The Union received the letters from them (Dobson and Shutz) in early June, the matter came up before the full body

which voted on it in June, both Dobson and Shutz were accepted into the Union in July, and they are still members of the Union today, though no longer employed by CATS at Wilmington.

Respondent Union also established in contrast with the above actual process, and Gautier's hearing assertion of Sloan's acknowledging to Gautier that he had interviewed the men that first day, that Gautier had recorded in his affidavit given the EEOC on August 4:

I heard from Wes Westbury, the operations manager, USA [th]at Sloan and Vaught came down and interviewed Dobson and Shutz either the afternoon of the meeting or the next day. At that time they signed up with the Union.

In contrast, on cross-examination, Jones acknowledged that he has never been a member of the ILA, that he never set foot in the ILA hall during the time Jones was working at CATS, that he never had asked for an application to become a member of ILA Local 1426, and that he never entered the hiring hall of Local 1426 after his termination with CATS to seek a job. However, Jones also testified credibly that he was never told about making an application.

#### 6. The meeting of May 17 or 18

Rose alone has related that about May 17 or 18 that they (Shinn and Gautier) came in and said they had *another* man that they forgot to mention Ben Jones, and they said that they wanted him to go to Savannah and work with them and to travel around with them. Rose recalled that Shinn said Jones was to work checking in the chassis and the containers, the repair on the containers; to monitor all the work (at) Port Wilmington, Savannah; and to travel around with them. According to Rose's recollection, after a lengthy discussion, the Unions had no objection, and it was agreed Jones would continue to work with them.

#### 7. Jones' subsequent employment

To the extent any Jones' testimony indicates of record that he did not get back on CATS' payroll through Olsten until October 23, working 2-3 days a week, such testimony is against the clear weight of more consistent evidence and is not credited. Other Gautier testimony would indicate CATS worked Jones soon after his May 15 termination on some maintenance problems in Savannah *and* that CATS for a period thereafter had worked Jones as above, once again as a temporary employee through Olsten (until October), with the claim that Gautier's middle management didn't want to lose Jones because of Jones' versatility in repairing containers, and because Jones could drive forklifts and do other things. Indeed, Gautier revealed that (status) had rocked along until Jones did what he had to do in regard to filing charges. However, in contrast with the above indicated renewed temporary employment of Jones at CATS as an Olsten employee, the parties had (earlier) stipulated (and placed in evidence only) Jones' W-2 wage and tax statement for 1989 showing CATS as the Employer of Jones.

It is warranted to be observed that on other occasions Gautier's testimony about the specific employment of Jones on jobs otherwise vacillated. Initially Gautier related Jones had been sent down to Savannah two times on maintenance.

Gautier then asserted it was Whitman who was first sent, and Jones later, but then changing it to Jones being sent only one time. Incongruously, Gautier has also related that Jones *usually* went down to keep tow motors or yard hustlers running and to do general maintenance. Finally, and in apparent effort to cover any revealed discrepancies, Gautier then offered blanket assertion that they were always alternating all types of personnel between the two ports in order to maintain continuity of operations.

In contrast, Vaught relates that he didn't know Jones (by sight); and he didn't see Jones at the facility for about 2-3 weeks. At that time Vaught observed an individual doing some incidental work and, on inquiry of another employee, Vaught was told it was Jones. Vaught never spoke with Jones. (Jones acknowledged that, other than Sloan, Jones never had any conversation with any officer of ILA Local 1426.)

Vaught relates that he did not see Jones working there regularly thereafter, but rather he usually saw Jones there only when a barge was in. Most of the time Vaught observed Jones working on maintenance service of turnbuckles that are used to stabilize containers on a barge. The service, or maintenance of the turnbuckles, though (apparently) performed in the maintenance shed, is considered gearman work, and not considered the work of the longshore container mechanic unit.

#### 8. The Employer settlement and other considerations

The Union had subsequent conversations with CATS about employees working on the vessels, but not about its maintenance men, with one asserted exception. After the Employer worked Jones as a temporary employee through Olsten, Gautier relates,

I don't remember how long that rocked on like that and then, of course, Ben did what he felt he had to do to protect his rights and I think we subsequently settled with the NLRB and the dates escape me again. I assume it was sometime late summer or early fall of '89, and in our settlement we agreed to take Ben back and he came back to work for us full time in the shop for three or four months, until the company actually wound up completing their merger deal with a company in Florida; closed Wilmington, and moved.

Although (strainedly) eschewing personal awareness of any of the details, Gautier subsequently acknowledged that on CATS' counsel's recommendation in the fall, Gautier made the decision to settle an unfair labor practice charge that Jones had brought before the NLRB against the Company. (Respondent established that Gautier had given no prior affidavit during an investigation of the NLRB charge Jones brought against the Employer and the General Counsel, and that Gautier had done so in regard to an EEOC investigation.) Gautier acknowledged that as part of the settlement CATS agreed to take back Jones full time in the same position Jones had before, and that Jones remained in CATS' employ thereafter until CATS had to close down its Wilmington operation, at that time releasing 16 employees, including Jones.

Although not without some confusion arising from an earlier reference to receipt of an EEOC charge and hearing in

which Sloan was also present (though apparently not involving Respondent Union), Sloan testified (I find) regarding an unfair labor practice charge that Jones brought against the Employer, that Sloan was out of town when Vice President Vaught called and told Sloan the Company had called and said they had agreed with the Labor Department (sic) for Jones to go back to work down there. On that occasion, Vaught asked Sloan what should he do. *Sloan said, "[L]et him go to work, we don't have anything to do with that."*

Gautier later revealed that the merger had not actually gone through. Merger negotiations started in September with Ocean Line of North Florida, a competitor out of Fernandino Beach, Florida. The merger went to about 80 percent of completion. In the process of trying to accomplish an economy of scale in consolidated operations, CATS' management decided to close Wilmington, which happened in mid- to late-January 1990. In March 1990 the merger fell apart. CATS has subsequently filed for protection under Chapter 7 of the Federal Bankruptcy Code in March 1990 and, apparently at time of hearing, Ocean Line was itself under Chapter 11. In asserting that the case does not lie against the Union and in urging the dismissal of the charges here, the Respondent Union in brief argues that Jones' recovery is against the Employer, and that Jones "should recover whatever he seeks from CATS by the filing of the necessary claim of lien with the trustee in bankruptcy."

Sloan has testified repeatedly that he had nothing against Jones and *that he had never told anyone for CATS that he did not want to see Jones (employed) there* and, specifically, that he did not meet Westbury until about a week after they had signed the agreement, and that he never had any conversation with Westbury and specifically none about the men.

#### Analysis, Conclusions, and Findings

In general a protected status under the Act may extend to all employees, whether the employee be full time or part time; an applicant or a probationary; permanent or steady; casual or temporary; or the individual actually be an employee of another employer. The Board has held that a discharge of a casual employee, probationary employee, or nonunit temporary employee constitutes a violation of the Act where a discharge is based even in part on the employee's union or other protected concerted activities, *Escada (USA), Inc.*, 304 NLRB 845 fn. 4 (1991); *Lafferty Trucking Co.*, 214 NLRB 582, 583-585 (1974); *Amole, Inc.*, 214 NLRB 67, 68-69 (1974).

In *Radio Officers v. NLRB*, 347 U.S. 17, 41-42 (1954), the Supreme Court centrally observed:

[A]n employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.

The Court also said, *id.*, 42-43, and as noted in *Teamsters Local 357 v. NLRB*, 365 U.S. 667 at 674-675 (D.C. Cir. 1961), explicated:

The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

The gravamen of the related 8(b)(2) violation is that a union may not:

cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. [*Id.*, 52-53.]

On union encouragement, the Court had earlier explained, *id.* at 40:

The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to 8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership "was not available to the employee on the same terms and conditions generally applicable to other members" or (if) "membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." Footnotes omitted.

On the matter of evidenced discrimination, first, there is no independent evidence of the Union's discriminatory operation of its hiring hall. There is nothing of record to indicate that the Union's hiring hall gang and other seniority referral structures were operated in material times in a discriminatory manner, whether the Union's hiring hall be considered as operated under subscription agreement, contract, or any other course of union conduct established here.

It appears to be uncontested of record not only that regular gangs that are referred, though presently composed of all union members, are all based strictly on seniority, continue to be reconstituted on that basis when and as required, and that any vacancies in gangs are filled irrespective of union membership. The Union has regular and ongoing occasion in the operation of its exclusive hiring hall to non-discriminatorily refer many nonunion employees.

There is no evidence of an unlawful closed shop in this proceeding, either contractually or by arrangement, practice, or understanding. Whatever may be the evidentiary support on this record otherwise for an inference to support a conclusion of presence of some form of union-security clause in the

contract, even if so present (e.g., as effective where legally permitted), in agreement with the General Counsel, I find any such contractual union-security provision was clearly nonenforceable in the State of North Carolina (§ 95-82). However, there is no independent evidence that such was ever sought to be enforced by the Union.

Because union membership is *not* shown or inferable to have been a qualifying factor in the operation of the Union's hiring hall in material times, Section 14(b) may not be here invoked to permit an application of a state right-to-work law to a nondiscriminatory hiring hall contractual arrangement that is privileged by the Act. Cf. *Laborers Local 107 v. Kunco, Inc.*, 472 F.2d 456, 458-459 (8th Cir. 1973) (and see also the cases cited thereat). There the Eighth Circuit pertinently said:

Section 14(b) does not empower states to ban all involuntary relationships between workers and unions. It merely allows the prohibition of "agreements requiring membership in a labor organization as a condition of employment . . . ." A hiring hall which, though exclusive, does not require union membership does not violate the closed shop prohibitions of 8(a)(3) . . . and thus, *a fortiori*, it is not within the ambit of 14(b). [Emphasis added, and citations omitted.]

Unlawful closed shop aside then, to establish an 8(b)(2) "attempt to cause" violation, there must be some evidence of the union's statement or conduct seeking the involved employer's discrimination that encourages (or discourages) union membership. It is not sufficient that the Employer's conduct might be expected to please the union, *Toledo World Terminals*, 289 NLRB 670, 673 (1988); nor, it would seem correlatively, is it to be deemed sufficient if it appears the employer elected on its own to act in some such discriminatory manner with a reasonably inferable purpose to preempt, or to defuse self-perceived, difficult economic, or other debilitating or problematic situations with the union, but without proof that the union actually caused or attempted to cause the Employer's apparent unlawful action.

There must be some admissible evidence that will support a union's causal nexus; if not a union's demand, then some evidence of a union request for some adverse discriminatory employment action, *Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100 (1986). If an explicit demand or request for a discriminatory employer adverse job action be not present, then there must be some equivalent evidence of an intended discriminatory employment pressure or inducement, reasonably to be attributed to the union. Cf. *Teamsters Local 287 (Consolidated Freightways)*, 300 NLRB 539, 537 fn. 18 (1990). (There a union representative told an employer representative that the employer had employed three individuals who were not active union members, including a named 8(a)(3); that the union was going to file a grievance, and that the employer was obligated to first employ certain individuals named on an (ineffective) list the union had given the employer to use when the hall was closed.)

If not involving some such expressed union threat of retaliation, there must then be some other form of union conduct sufficient to reveal an unlawful union intent to arouse the employer's fear that a hire, reemploy, or as here a continued

employ by the Employer of an individual questioned by the Union "will result in economic pressure against him," *Bricklayers Local 18 (Ferguson Tile)*, 151 NLRB 160, 163 (1965); but not a mere employer awareness there exists internal union difficulties with an employee, *Laborers Local 158*, supra; or employer awareness that the employer's own other employees' may have difficulties with the employee, even if the same be a condition reported to the employer by the union, see, e.g., *Sheetmetal Workers Local 67 (George Williams Sheetmetal)*, 201 NLRB 1050, 1055 (1973); *Continental Overall Co.*, 116 NLRB 1588, 1589 (1956); and *Studebaker Corp.*, 110 NLRB 1307, 1320, 1324-1326 (1954), affd 229 F.2d 138 (7th Cir. 1956).

The central considerations in all such cases appear to be whether a union official is (only) conveying attitudes of its members, or passing on a desire of the union itself for an employer's adverse employment action, or whether what was actually involved was some improper union advancement of questions of union membership obligations and policies, or what was actually involved were union antagonistic positions on an employee's union activity, union fealty, or other statutory protected activity. However, a union reference to union membership will not by itself be controlling, if all the circumstances warrant a contrary finding of lawful action intended, *Hellenic Lines*, 228 NLRB 1, 7 (1977).

There is no independent allegation in the complaint that the Union failed to fairly represent Jones as a unit employee in violation of Section 8(b)(1)(A). Cf. *Federated Department Stores*, 287 NLRB 951 (1987); nor is it alleged in the complaint that the Union has denied Jones' membership in the Union because of Jones' union or other protected concerted activity or desire to refrain from such.

Finally, Section 8(b)(1)(A) proscribes a union from restraining or coercing employees in the exercise of their Section 7 rights, but with the explicit statutory provision, however, that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." In that regard, although a union cannot use an employer, as in hiring hall circumstances, as its surrogate to enforce the Union's internal affairs, *Longshoremen Local 1408 v. NLRB*, 705 F.2d 1549, 1552 (1983), this does not mean that a union may not otherwise internally regulate its own affairs, including the above statutorily explicit matter of determining its own union membership, as it there pursues enforcement of a "properly adopted rule," which "reflects a legitimate union interest," thereby "impairs no policy Congress has imbedded in the labor laws" and "is reasonably enforced against union members who are free to leave the union and escape the rule," *Scofield v. NLRB*, 394 U.S. 423, 430 (1969). The Union's rules governing an individual's application for membership in Local 1426 qualify thereunder.

In general, a union and an employer may enter agreement pursuant to which the union will operate a hiring hall referral service for referral of casual or temporary employees on a nondiscriminatory seniority basis to the employer for employment, *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), and with other appropriate objective qualifications, *Hellenic Lines*, 228 NLRB 1, 2 (1977).

The General Counsel has centrally argued that the Board has held that a lawfully contracted exclusive hiring hall provision (or arrangement, practice, or understanding establish-

ing such) may not be applied retroactively, i.e., to justify the discharge of an employee hired before the contractual hiring hall provision, practice, or understanding had become effective, *Austin & Wolfe Refrigeration*, 202 NLRB 135 (1973); citing *Teamsters Local 676 (Tellepsen Petro-Chemical)*, 172 NLRB 948 fn. 1 (1968).

The parties have elected not to introduce the applicable contract(s) into evidence. Nor did they introduce the written provisions of the hiring hall. There is vagueness in the testimony of record bearing on the contract(s) negotiated on May 12 and as to the explicit terms of the related hiring hall provisions. Although actual contract(s) negotiated is (are) not introduced in evidence as exhibit(s) and, although the parties have also stipulated that a combined unit of the Employer's longshoremen and container maintenance mechanics employed at Wilmington is an appropriate unit for the purposes of collective bargaining, on the basis of the evidence of record on the Union's prior practice in negotiating separate contracts with others, and other record evidence which is supportive of that practice continuing with the Employer, e.g., the Union's proposals to CATS initially and especially in those circumstances, in the absence of any evidence specifically to the contrary, I infer and I find that on May 12 the Union and the Employer negotiated separate contracts for longshoremen and for container maintenance mechanics, in keeping with the Union's apparent practice in the past.

The General Counsel's arguments would appear not to differ in either event. See, e.g., on separate units, cf. *Electrical Workers IBEW Local 323 (Active Enterprises)*, 242 NLRB 305, 308-309 (1979), where the Board held separate units voluntarily bargained by parties could not be unilaterally attacked. There, with the expiration of one contract in an essentially restructured unit of residential electricians, the hiring hall provision of the remaining (originally inclusive) commercial electricians' contract could not be automatically then applied to the residential unit by the Union.

There is some degree of confusion as to terms of the hiring hall service as made applicable to mechanics. In the absence of written provisions of the hiring hall in use being in evidence, I conclude on the record before me that the parties had generally agreed as part of the contracts negotiated on May 12 that the Union would provide a similar exclusive hiring hall service for the Employer's mechanics as for its longshoremen. However, in light of the May 15 meeting, I infer and find that the parties had not theretofore explicitly agreed to terms for the exclusive hiring hall referral service's application to permanent, full-time (steady) mechanics, let alone considered details of its application to part-time, casual, and/or temporary employee(s) employed by or at CATS. Rather, I conclude and find those were details discussed in the meeting of, and (essentially) determined on, May 15.

In the underlying *Tellepsen* case, supra, the Board specifically noted that in finding a violation, it was relying solely on the grounds that there was no contract, arrangement, or course of conduct which would establish a lawful hiring hall agreement at the time the employee was hired. The Board then held that because the union had no contract right, the union was actually seeking a compliance of the employee with an obligation of the union's membership. Essentially, the General Counsel has discounted the (August 1988) existence of the subscription agreement that was applicable before

Jones was hired, because that temporary agreement did not extend any coverage to container mechanics.

Though container mechanic coverage was a subject of the union proposed negotiation at the outset, and eventually negotiated, the parties had initially proposed separate agreements, e.g., with the Union's initially presenting separately negotiated contracts for the Employer's consideration and approval, and with the Employer then counterproposing either a future signing of an agreement with the Union covering its container mechanics, or CATS' use of a local container repair maintenance company for that purpose. Though CATS also informed the Union at the outset that it then employed only one container mechanic, and though the Company thereafter during the entire 1988 negotiation only employed temporary container repair mechanic(s), when needed, whatever the parties understanding, the fact is, as urged by the General Counsel, the subscription agreement itself did not cover mechanics.

*Austin & Wolfe Refrigeration*, supra, acknowledged the applicable effect of core holdings of *Radio Officers v. NLRB*, supra, and the subsequent holdings of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); and *Teamsters Local 367 Teamsters v. NLRB*, 365 U.S. 667, 675 (1961), that for a violation of Section 8(a)(3) there must be both discrimination against an employee for union-connected reasons and discouragement of union membership thereby. In *Austin & Wolfe*, the Board found that the union there had insisted on discharge of an individual because the individual had not been referred by the Union's hiring hall, or because he was not receiving union scale, which the Board concluded "was the plainest kind of discrimination."

In regard to an 8(a)(3) violation alleged and found, the Board also said in *Austin & Wolfe*, that an application of the negotiated lawful hiring hall retroactively was "so inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. In a 2 to 1 panel determination, the Board alternatively held even if the second category of *Great Dane*, supra, were deemed to apply, namely, where the resulting harm to employees is comparatively slight, and if a "substantial and legitimate business end is served" the employer's conduct is prima facie lawful and an affirmative showing of improper motivation must then be made, that a negotiated circumvention of the Government's wage controls in that case was not a "legitimate business end."

In agreement then with the General Counsel's central contention, I conclude at the outset and find that under *Austin & Wolfe*, supra, the Union was not contractually privileged to require the Employer to release any of CATS' full-time permanent employees that had been hired prior to the time the agreement was negotiated or understanding reached that established the Union's contractual right to exclusively refer all container mechanics to CATS in the future. However, in the circumstances of this case, it would then appear less clear whether the Union could not lawfully take the position with the Employer on May 15 that with the newly negotiated contract, the Employer had to thereafter use the new contract's exclusive hiring hall provisions for a referral of casual and temporary employees to fill the Employer's needs for the employees to work only part of the time, or to do unit work on which CATS had worked employee(s) of another employer as temporary. Neither may it in any event be over-

looked that it must still be established that the Union had actually in some manner caused or attempted to cause the Employer to take some unlawful action in that regard under Section 8(a)(3).

Sloan's assertion that the conversation (of substance) on the morning of May 16 began with Jones' asking what Sloan had against Jones, and Sloan's reply that he had nothing against Jones, was not explicitly denied by Jones. However, I do not credit Sloan in the degree of Sloan's testimonial protestations made here that were to the effect that Sloan had repeatedly told Jones about Sloan not knowing Jones, and not having anything against Jones. (The protestations appeared incongruous with the attendant circumstances of that discussion, and are viewed as also inconsistent with Sloan's admitted knowledge of Jones from more likely prior reports of Sloan's membership.)

However, neither do I credit Jones to the extent he would assert that Sloan gave Jones no indication Sloan had said he had nothing personally to do with it. Rather I am convinced that Sloan not only told Jones that it was Jones' oral contact with some members of the Union up at the Sportsman's Club that was the reason Jones was not being accepted for membership in Local 1426, but Sloan had told Jones in substance and effect that he had nothing to do with it.

Thus, in crediting Jones and Sloan (and limitedly Smith) that Jones did that morning essentially ask Sloan why Jones wasn't or couldn't get accepted into the Union with the rest of the guys, Sloan had directly replied it was because some of the members of the ILA had said Jones had made some comments about or to some of the (Union) brothers up at the Sportsman's Club. It was a stated reason that itself is not shown on this record in any way related by Jones to Jones' purported engagement in any actual union or other concerted activity, nor convincingly in that regard by Smith.

Sloan's reply is rather directly addressed only to the point of Jones' confrontational inquiry of Sloan, namely, why Jones was being denied acceptance in union membership that was being made available to others. In this regard I have carefully considered Jones' and Sloan's accounts of this encounter on the morning of May 16, and all the witnesses' accounts as to the meeting the prior afternoon and events thereafter, and I conclude and find there is no evidence at all that Sloan told Jones or Gautier that the Union would not allow CATS to continue to employ Jones as its employee, because of Jones' lack of membership in the Union. In the absence of corroboration from anyone else, Smith's stated but fatally inconsistent offerings that have only occasionally encompassed statements to Sloan of a denial of membership to Jones for other arguably unlawful reason simply cannot be selectively credited and are not.

Moreover, the complaint does not in any event allege that Jones was denied membership in the Union because of his union or protected activity, nor is it evidenced here that Sloan or the Union had in any way subsequently prevented Jones' nondiscriminatory use of the hall, see *Carpenters Local 537 (E. I. Du Pont)*, 303 NLRB 419, 421 at fn. 5 (1991). (Sloan did clearly treat Jones disparately in not informing him as a unit member about procedures for union membership application, as compared with Dobson and Shutz, though Sloan's reasonably clear own view of Jones' likely rejection by the Union's membership would explain that.)

Though the same bears on considerations of the content of the meeting that had occurred the previous day, on which the General Counsel would appear to also heavily rely, that meeting does not warrant a different conclusion. On a not insignificant number of occasions I have found Gautier's assertions and recollections to be unreliable for reasons that need not be all revisited here, beyond the noting, in a number of such instances there were substantial inconsistencies by Gautier on how the Company had continued to employ and work Jones, which has given me not insubstantial cause to question what Gautier has asserted of Jones' employment generally.

Nonetheless, and mainly because of Sloan's admissions in his conversation with Jones in the following morning, May 16, I credit Gautier's (unembellished) recollection to the extent that (I find) in the meeting in the prior afternoon of May 15, and after the Company had named five mechanics, and had expressed its openness to a union discussion of union membership with its employees and/or requested that the Union extend membership protection to them, that Sloan more probably than not had then replied in substance with the comment that Gautier's recollection has attributed to him, namely that Shinn and Gautier should forget about union membership for Jones (and Whitman); the Union(s) could not discuss them, as they would not be accepted in the ILA. The record is clear however, even in this instance, that the comment arose in context of the parties' discussion of union membership, as raised by the Employer's request, or inquiry.

Even assuming without finding, Gautier's unembellished recollection, that Sloan had also in *this* meeting referred to Jones as a troublemaker, that was also but in direct reply to the Employer's purported further inquiry why union membership would not be made available to Jones as it would be to others. (In this instance, given the nature of Gautier's uncorroborated recollection, and his clear propensity to exaggerate and embellish, as well as the circumstances of Sloan's *corroborated* denials that he had made comments about Jones, or that Gautier had admonished him on it, I am simply not convinced Sloan said Jones was a troublemaker in their meeting of May 15, or that Gautier called him on it. (First, if Sloan had, and Gautier had called Sloan on it, I am persuaded that would also have been a subject of Jones' inquiry the following morning. Second, I am persuaded that at this time the Employer had alternatives under active consideration, in place of confrontation.)

Beyond the above Sloan's statements to Shinn and Gautier to forget union membership for Jones, as the ILA membership would not accept him, and Sloan's statement (essentially) affirming the denial of membership to Jones, there isn't any persuasive evidence that Sloan told the Employer that he wouldn't allow CATS to employ Jones in the future, because of that lack of membership. The General Counsel's reliance in that regard is on a statement (whether as stated at the hearing or in the affidavit) that Sloan had said he would not or could not agree to allow the Employer to keep all of its mechanics. But that related to the position the Union was taking on how the exclusive hiring hall applied to mechanics generally and does not carry the day for the General Counsel that the Union was out to bar Jones as such from the job for lack of union membership.

The question of whether Jones was named as a full-time employee momentarily aside, there was immediate partial

moderation of the statement as to full-time employees, as is evidenced by the credited union agreement to the Company's keeping employed all of its named full-time (permanent or steady) mechanics under the circumstances found above. Wholly apart then from circumstances of the above contract, and the deficient Employer observations on full-time and part-time employees, on the facts of this case as developed (I find) Sloan did agree that the Employer could keep all the named full-time employees employed.

In the end I have relatedly concluded that Jones at this time more likely was a full-time employee of CATS than not. However, there isn't convincing evidence of record that Shinn or Gautier had told Sloan in this meeting that Jones was a full-time employee. Rather, on weight of credited evidence, I find that the discussion of Jones was likely broken off in this meeting, with the Union's above comments made that Employer could forget union membership being afforded Jones.

The Union raises vexing question in brief, if not Jones, who was the second part-time (or second temporary) employee referenced of record from time to time. I further note a Gautier statement of putting Shutz directly on CATS' payroll, who is identified otherwise as a full-time employee. If I have any lingering suspicions therefrom that it wasn't an Olsten temporary employee Smith after all who was initially discussed in this meeting as a third full-time employee (besides Whitman and Dobson), and that Shutz wasn't a full-time employee of CATS at the time but rather also a part-time, or even (in light of being put directly on payroll) a temporary employee along with Smith with whom Shutz had been (essentially) hired, leaving Jones more exposed as the likely third full-time employee actually named in this meeting, and that Sloan has more credibly (albeit generally) recorded in prior affidavit, that is simply not what *any* of the parties' witnesses have testified was the Employer's stated report in the meeting as to Jones, and the others. I decline to speculate.

In contrast the record does reflect that the Company did request the Union to accept all its full-time employees. The Union did accept the Company's identification of its full-time employees and, after discussion, the Union accepted the Company's named full-time employees, including those that the Company later presented in correcting errors it purportedly made on who was, and was not, a full-time employee. CATS also did keep in its employee all those above whom the Company named as full time, and the General Counsel's offered evidence just doesn't prove otherwise as to Jones.

Additionally, the fact is that the Employer at the time had an alternative off port place under active consideration, but which fell through for economic reasons, leaving the Employer then in dire economic straits even otherwise, all of which appears to more support conclusion that on reflection on such matters, the Employer might have been itself unwilling to expose itself to further potential economic harm by a continued employ of Jones who would not only likely not be a member of the Union, but potentially also be in daily contact with others who were members of the Union and with some of whom the Employer now knew Jones had had prior difficulties. However, the fact is that Employer kept Jones working and, more significantly, any indicated fear of economic effect, real or imagined, was not on this record shown reasonably broached as intended by any union act. The Gen-

eral Counsel's further urged argument, that the Employer would have been similarly affected by certain purported improper union conduct that was enjoined in earlier labor dispute, though different in nature, is also not shown connected to any current union-requested job action against Jones.

The heart of the General Counsel's case then remains *Austin & Wolfe*. In that regard the Board appears to have held since *Austin & Wolfe* that an employer may agree with a union regularly supplying casual or temporary employees to perform longshore work and to also supply mechanics to the employer on a steady or casual basis and, consonant therewith, the employer may effect an adverse job action, e.g., change a steady employee to a casual employee (with the employee to effectively return to the hall for nondiscriminatory referral), so long as not changing the status of an employee for some discriminatory or other unlawful purpose. Cf. *Seatrail Terminals of California*, 205 NLRB 814 (1973).

But in that regard, if a union regularly supplying casual or temporary employees on a nondiscriminatory basis may negotiate with an employer for the union to thereafter nondiscriminatorily provide permanent, full-time (or steady) employees, who will not have to be referred daily, *Seatrail*, supra, it would seem to follow as within such collective-bargaining accommodation, that the Union may negotiate otherwise where the employer's need is more suitable to normal casual or temporary referral, e.g., for employees who are only needed to work part of the time, or perform unit work that the Employer has had performed previously by a temporary, by whomever employed.

The Ninth Circuit has observed that an essential element to limit the Union's discretion in bargaining with respect to seniority rights of unit employees is a union's "intent to hostilely discriminate" against a unit employee, *Longshoremen v. Kung*, 50 LC ¶ 19,905 (1964). (Evidence of that hostility against Jones is not present.) The Board has observed otherwise, "[A]ny change in the priority system necessarily is going to affect the priority of some employees who use the exclusive referral system." *National Electrical Contractors Assn.*, 190 NLRB 197 (1971). (In that regard, e.g., in the Union's agreement to the Employer's employment of steady employees, the Union's hiring hall labor force of casuals and temporaries may be viewed to be adversely impacted.) On the wide range of reasonableness for the statutory bargaining agent, cf. *Ford Motor Co. v. Hoffman*, 345 U.S. 330, 337-338 (1953).

Thus, having negotiated a contract for exclusive referral of all (steady, casual, or temporary) mechanics to fill the Employer's container mechanic needs in the future, I conclude and find, for all the reasons stated above, that although the Union was contractually privileged to refer all permanent or full-time employees in the future to the Employer through the Union's exclusive hiring hall referral system, the Union was not contractually privileged to require the Employer to release any full-time mechanics whom the Employer had employed prior to the time the parties had negotiated the contract providing for the Employer's exclusive use of the Union's hiring hall service. The Employer could alter the job state of a full-time employee and effectively return such an employee to casual or temporary status for hiring hall purposes, providing the Employer did not do so unlawfully for the Union or other protected concerted activity purpose, or at the request of the Union for any such purpose.

The Union was contractually, and thus lawfully, privileged to require the Employer to fill its future part-time or temporary employee needs thereafter in accordance with the use of the negotiated exclusive hiring hall referral system that was then established for referral of all casual or temporary employees that I conclude and find reasonably encompassed CATS' future needs in unit work theretofore performed by part-time employees and Olsten's temporary employees. The conclusion would appear only the more warranted here, where the contractual parties have indiscriminately referred to a temporary (Olsten) employee as a part-time employee as they have done here.

It thus appears to make a difference not only whether Jones at the time of the negotiated contract was a full- or part-time (or temporary) employee. It makes a difference as to both what the Union actually knew or had reason to know at the time about Jones' actual employment status and, in any event, what the Union actually did in light of what it then reasonably knew.

In the end I have found that Jones probably was a full-time CATS' employee, but on this record he is not effectively shown as so identified to the Union in the meeting of May 15, and rather could be reasonably viewed by the Union at that time as part time (or still temporary). But even if I am in error on the basic premise above and existing employees who have worked part time, even as temporary employees, must also be retained as such, under some arrangement of the Employer's direct call, it was incumbent on the General Counsel to show that the Union had caused the Employer to take job action for some discriminatory reason, which the evidence of record has failed to establish beyond the fact that the Union denied membership to Jones that is ineffective by itself to establish that or other unlawful purposes. The fact is on this record that the Union accepted the Employer's retention of every full-time employee named and, on this record though Jones is found to be an actual full-time employee of CATS at this time, he was not retained by the Employer in his old job.

In summary, Jones had the protection of the Act that the Employer would not terminate him, nor discriminate against him, because Jones was not a member of the Union (but that is not the issue in this complaint). Jones also had the protection of the Act that the Union would not itself cause, or attempt to cause, the discharge of Jones (whether Jones was a full-time, part-time, casual, or temporary employee), if the purpose was because Jones was not a member of the Union, especially in light of the statutorily explicit restricted disparate denial of union membership that is apparent here; nor do so otherwise, because Jones had engaged in union, or other protected concerted activity, or because he had previously elected to refrain from doing so (of which there is also no evidence). But Jones did not have protection of the Act if being solely denied a consideration for acceptance into union membership because of his earlier social conduct vis-a-vis other union members that did not involve union or other protected concerted activity.

Because the Employer's action thereunder may be lawful or unlawful under the certain given circumstances, the Employer's conduct had to be shown as engaged in for an unlawful purpose for a violation of the Act to be found. (In *Austin & Wolfe* it was found that the altered state of employees who were union members had *not* violated Section

8(a)(3), but it was shown that the employer had taken the action it did for an unlawful anticoncerted activity purpose, namely, because certain employees had pursued a claim under a contract that the employer viewed (with union-indicated approval), to be without merit.) It would appear to follow, that where a union action is alleged to be violative of Section 8(b)(2) in attendant circumstances, as here, it must also be shown the Union had caused, or attempted to cause, an unlawful Employer action, with the Union free to show the contrary. Here, basically, the Union was denying membership to Jones, and seeking to have part-time and temporary jobs filled by casual and temporary referrals, generally, but there is no convincing evidence that the Union sought the Employer's job action against Jones that followed because Jones was not a member of the Union, as is alone alleged in the complaint.

To prevail, it seems to me, that the General Counsel must have the *Austin & Wolfe* principle extend broadly to preclude the exclusive referral of casual and temporary employees to fill the Employer's ongoing part-time and/or temporary employment needs, so that the Union effectively could not stand on *any* claim of the hiring hall's lawful restriction of the Employer's initially requested continuance of all its maintenance mechanics, including Olsten's temporary performing unit work, and with specific evidence of motivation then also unnecessary on the *Great Dane* principle. In light of the Board's subsequent holding in *Seatrains*, supra, and considerations of the unit employees' claim on the unit work vis-a-vis that being performed by the employees of another employer, I do not think *Austin & Wolfe* now extends so far.

In the end, it is the responsibility of the General Counsel to persuade that CATS had identified Jones as a permanent full-time employee (which the offered evidence doesn't), and that Respondent Union caused, or attempted to cause, CATS not to continue Jones in its employ, because of his lack of union membership and/or because he was not referred out to the job under the hiring hall newly established after his employment, but which is not shown effected by any unlawful union action. General Counsel's 611(c) witness Gautier framed the Company's request at the time as essentially being that the Union afford all the Employer's mechanics protection *by acceptance of them into the Union*, and the central thrust of both Jones' and Gautier's evidence is unquestionably that Union had only said it would deny Jones acceptance into Respondent Union's membership that was being afforded others and, on inquiry, then gave the reason why.

Finally, although it appears more plausible that the Union was later informed that Jones would have other assignments that involved traveling, conflicts bearing on that circumstance need not be resolved because later circumstances that week would not affect the outcome of the issues raised by the complaint. Nor do they bear on motive. What is significant is that the Union accepted the Employer's continued use of Jones, and there is no evidence that the Union prevented Jones' use of the Union's hiring hall. Indeed, on the basis of the (sole) W-2 tax statement of record, CATS appears as established as the Employer of Jones in the entire material year, any indication of Jones' renewed Olsten's temporary employment service to the contrary in Gautier's and Jones' accounts. It would thus appear more likely Jones had continued as an actual, direct employee of CATS, albeit (at least)

when working at Wilmington, working mostly on nonunit jobs, but in Savannah on unit work, and then at and for some period of time working but 2–3 days per week at which point Jones had filed charges against the Employer in July, which were later adjusted by settlement in October.

For all of the above reasons, I remain unconvinced that the General Counsel has met his burden of showing that the Respondent Union caused, or attempted to cause, the Employer to discriminate against Jones by terminating him on May 16, because of Jones' lack of union membership in violation of

Section 8(b)(1)(A) and (2) and, accordingly, it will be recommended that the instant complaint be dismissed in its entirety.

#### CONCLUSION OF LAW

The Union has not engaged in the unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) of the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]